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No. _____ (1)

IN THE

Supreme Court of the United States

October Term, 1986

TWC HOLDINGS, INC., *Petitioner,*

v.

JOHN F. HARKINS CO., INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does this Court's holding in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983) govern federal district courts' interpretations of contracts when determining the existence and scope of agreements to arbitrate under the Federal Arbitration Act?

2. May a federal court of appeals apply the clearly erroneous standard of review to a district court's determination of the existence and scope of an agreement to arbitrate if it determines the district court was "interpreting" rather than "construing" the language of the agreement?

3. May federal trial and appellate courts decline to follow this Court's mandate in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), in determining arbitrability of commercial disputes other than labor disputes?

4. Under the Federal Arbitration Act can a subcontract provision requiring the arbitration of "all disputes" be rendered inoperative by the existence, in the subcontract, of an incorporation by reference provision merely because the incorporated prime contract has no similar "all disputes" arbitration clause?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner The Waldinger Corporation and the respondent John F. Harkins Company, Inc.

The Waldinger Corporation, currently known as TWC Holdings, Inc., has no parent company, subsidiaries or affiliates to list pursuant to Rule 28.1.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 28.1 LIST	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
1. The Third Circuit's holding that district courts engaged in contract "interpretation" in determining the existence and scope of an agreement to arbitrate under the Federal Arbitration Act are not bound by the strong federal policies favoring arbitration conflicts with prior decisions of this Court	7
2. The decision below that the District Court's contract "interpretation" determination concerning the existence and scope of an agreement to arbitrate disputes was reviewable pursuant to the clearly erroneous standard is in conflict with decisions of this Court and other circuits	12
3. The Third Circuit's holding that the strong federal policy favoring arbitration is restricted to the environment of labor disputes not only directly conflicts with decisions of this Court and other federal courts of appeals but effectively eviscerates the efficacy of the Federal Arbitration Act and its attendant policies as they relate to agreements to arbitrate disputes in the commercial context	18

4. The Third Circuit's holding that an "all disputes" arbitration provision contained in a subcontract can be rendered inoperative by the subcontract's "incorporation by reference" provision merely because the incorporated prime contract does not have a similar "all disputes" provision has such a far reaching effect upon the viability of arbitration agreements in the commercial context that it warrants an exercise of this Court's power of supervision 19

CONCLUSION 23

APPENDIX

(Opinion of Court of Appeals, Memorandum Decision of District Court, Order of District Court, Notice of Judgment of Court of Appeals, Order of Court of Appeals — Petition for Rehearing, Order — Stay of Mandate) .....(A 1)

TABLE OF AUTHORITIES

Cases: Page

Affiliated Food Distr., Inc. v. Local Union No. 229, 483 F.2d 418 (3d Cir. 1973) 20

Anderson v. City of Bessemer, 470 U.S. 564 (1985) 13, 16, 17

Atlas Pallet, Inc. v. Gallagher, 725 F.2d 131 (1st Cir. 1984) .. 13

Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39 (3d Cir. 1978) 11

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984) 17

Commercial Metals Co. v. United States, 176 Ct. Cl. 343 (1966) 11

Cases: Page

County of Durham v. Richards & Associates, 742 F.2d 811 (4th Cir. 1984) 19

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 84 L.Ed.2d 158, 105 S.Ct. 1238 (1985) 19

Diamond Fruit Growers, Inc. v. Krack Corporation, 794 F.2d 1440 (9th Cir. 1986) 13

Dugan & Meyers Constr. Co., Inc. v. Worthington Pump Corp., 746 F.2d 1166 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 2675 (1985) 13, 21

Exchange Mutual Insurance Co. v. Haskell Company, 742 F.2d 274 (6th Cir. 1984) 19

Explo, Inc. v. Southern Natural Gas Co., 788 F.2d 1096 (5th Cir. 1986) 13

Fisher v. A. G. Becker Paribas, Inc., 791 F.2d 691 (9th Cir. 1986) 19

Hancock Laboratories v. Admiral Insurance Co., 777 F.2d 520 (9th Cir. 1986) 13

In Re Mercury Constr. Co., 656 F.2d 933 (4th Cir. 1981) 14

International Union v. General Electric Co., 714 F.2d 830 (8th Cir. 1983) 13

John W. Johnson, Inc. v. Basic Constr. Co., 429 F.2d 764 (D.C. Cir. 1970) 21

Johnson Controls, Inc. v. City of Cedar Rapids, Iowa, 713 F.2d 370 (8th Cir. 1983) 11, 20

Kern Oil & Refining Co. v. Tenneco Oil Co., 792 F.2d 1380 (9th Cir. 1986) 14

Marchese v. Shearson Hayden Stone, Inc., 734 F.2d 414 (9th Cir. 1984) 13

McKinney Drilling Co. v. Collins Co., 517 F.Supp. 320 (N.D. Ala. 1981), *aff'd*, 701 F.2d 132 (11th Cir. 1983) 21

Miller Brewing Company v. Fort Worth Distributing Co., 781 F.2d 494 (5th Cir. 1986) 19

Cases: Page

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., ____ U.S. ____, 87 L.Ed. 2d 444, 105 S.Ct. 3346 (1985) 14, 15, 16, 19

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155 (1st Cir. 1983) 15, 16

Moses H. Cone Memorial Hospital v. Mercury Constr. Co., 460 U.S. 1 (1983) 5, 6, 8, 14, 15

New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) 19

Perry v. United States, 146 F.2d 398 (5th Cir. 1945) 21

Prima Paint Corp. v. Flood and Conklin Mfg. Co., 388 U.S. 395 (1967) 22

Ram Construction Company, Inc. v. American States Insurance Company, 749 F.2d 1049 (3d Cir. 1984) 9

Rush v. Oppenheimer & Co., 779 F.2d 885 (2d Cir. 1985) 19

Schultz v. Onan Corp., 681 F.2d 177 (3d Cir. 1983) 20

SCM Corp. v. United States, 675 F.2d 280 (Ct. Cl. 1982) 20

Southern Natural Gas Co. v. Pursue Energy, 781 F.2d 1079 (5th Cir. 1986) 14

Supre v. Ricketts, 792 F.2d 958 (10th Cir. 1986) 14

United States Steel Corp. v. Turner Constr. Co., 560 F.Supp. 871 (S.D. N.Y. 1983) 21

Washington Metropolitan Area Transit Authority v. Norair Engineering Corporation, 553 F.2d 233 (D.C. Cir. 1977) 21

Willoughby Roofing & Supply v. Kajima Int'l, 776 F.2d 269 (11th Cir. 1985) 19

STATUTES AND OTHER AUTHORITIES

9 U.S.C. §3 ..... 2, 3

28 U.S.C. §1292(a)(1) 2, 5

28 U.S.C. §1332(a) 2, 3

28 U.S.C. §1441(a) 2, 3

Sup. Ct. R. 17.1(a) 19

Corbin on Contracts, §547 20
Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM L. REV. 833 (1964) 10
Restatement 2d, Contracts §203 20

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The Waldinger Corporation, *Petitioner,*

v.

John F. Harkins Co., Inc., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, The Waldinger Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled proceeding on July 14, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 796 F.2d 657, and is reprinted in the appendix hereto. (A 1)

The memorandum decision of the United States District Court for the District of New Jersey (Stanley S. Brotman, J.) has not been reported. It is reprinted in the appendix hereto. (A 27)

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. 1332(a), the petitioner removed an action in New Jersey Superior Court, Chancery Division to the United States District Court for the District of New Jersey, pursuant to 28 U.S.C. §1441(a).

The decision of the District Court was appealed to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1292(a)(1). The judgment of the Court of Appeals for the Third Circuit was entered on July 14, 1986. (A 56) A Petition for Panel Rehearing and Rehearing In Banc was denied on August 20, 1986. (A 57-58).

The jurisdiction of this Court to review the judgement of the Third Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

9 U.S.C. §3. Stay of proceedings where issue therein referable to arbitration.

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

STATEMENT OF THE CASE

The disputes underlying this litigation arose from the construction of the Atlantic City Hilton Hotel/Casino ("Project"). Hilton New Jersey Corporation ("Hilton") was the owner of the Project. Tishman Construction Corporation ("Tishman") was the construction manager and agent of Hilton. Respondent, John F. Harkins Co., Inc. ("Harkins") was the mechanical contractor on the Project. Petitioner, The Waldinger Corporation ("Waldinger") was the heating, ventilation and air conditioning sheetmetal subcontractor to Harkins on the Project. Both Waldinger and Harkins asserted claims against the other alleg-

ing certain breaches of the parties' Subcontract.

On November 9, 1984, Waldinger initiated arbitration of the parties' disputes by filing a Demand for Arbitration with the American Arbitration Association pursuant to Paragraph 17 of the parties' Subcontract which provides:

> All disputes, claims or questions arising hereunder shall be subject to arbitration and shall be submitted to arbitration in accordance with the provisions, then obtaining, of the Standard Form of Arbitration procedure of the A.I.A. A determination thereunder shall be final and binding upon the parties thereto. Pending determination, there shall be no work stoppage. (A 8)

The forgoing "all disputes" arbitration provision is contained in Harkins' standard form subcontract. This form subcontract was provided by Harkins to Waldinger and Waldinger did not participate in this drafting.

On May 13, 1985, Harkins commenced an action in New Jersey Superior Court, Chancery Division, seeking, *inter alia*, to restrain the arbitration proceedings. Waldinger removed the suit to the United States District Court for the District of New Jersey pursuant to 28 U.S.C. § 1441(a) invoking the jurisdiction of the District Court under 28 U.S.C. § 1332(a) on the grounds of diversity of citizenship. With a full reservation of its rights to arbitration, Waldinger answered Harkins' Complaint, asserted its Counterclaim against Harkins and moved the District Court pursuant to 9 U.S.C. §3 for a stay of judicial proceedings pending arbitration. Thereafter, Harkins filed its Motion for Injunction of Arbitration.

In its motion Harkins contended that an incorporation by reference provision found in the parties' Subcontract, at Paragraph 2, operated to incorporate two arbitration provisions of the prime contract between Harkins and Tishman into the Subcontract which in turn, Harkins argued, supplanted Paragraph 17 of the Subcontract. Paragraph 2 of Harkins' form Subcontract provides:

> (2) Work performed by SUBCONTRACTOR shall be in strict accordance with CONTRACT DOCUMENTS applicable to the Work to be performed and materials,

> articles, and/or equipment to be furnished hereunder. SUBCONTRACTOR shall be bound by all provisions of these documents and also by applicable provisions of the PRINCIPAL CONTRACT to which the CONTRACTOR is bound and to the same extent. Where specific work as set forth in the CONTRACT DOCUMENTS is described in this order, SUBCONTRACTOR shall perform all work normally construed to come within the scope of his activities, as required by the CONTRACTOR under the PRINCIPAL CONTRACT. All work shall be performed to the complete satisfaction of the CONTRACTOR, the Architect and the Owner. (A 8)

Articles 37 and 38 of the prime contract between Harkins and Tishman provide for arbitration of disputes involving the amount, in case of disagreement, to be paid for written and signed change orders. (A 9)

Waldinger did not contest Harkins' assertion that the disputes submitted to arbitration were outside the scope of Articles 37 and 38 of the prime contract. Similarly, Harkins did not contest Waldinger's assertion that the disputes were within the "all disputes" scope of Paragraph 17 of its form Subcontract. Instead, Harkins argued that Paragraph 2 of its form Subcontract operated to incorporate Articles 37 and 38 of its prime contract with Tishman into the Subcontract between Harkins and Waldinger to the exclusion of the "all disputes" arbitration provision found at Paragraph 17 of the Subcontract. (A 8) Waldinger contended that Paragraph 2 does not so operate. Waldinger urged that even assuming the articles' incorportion via Paragraph 2 of the Subcontract, their incorporation did not operate to limit or restrict Waldinger's rights to arbitrate "all disputes" as provided in Paragraph 17 of the Subcontract; the arbitration provisions harmoniously coexisted.

On September 19, 1985, the District Court heard oral argument and by Order filed September 30, 1985, denied Waldinger's Motion for Stay of Action Pending Arbitration and granted Harkins' Motion for Injunction of Arbitration. (A 54) The Order was subsequently entered on October 2, 1985. (A 54) The District

Court ordered that Waldinger has no right to arbitrate any disputes with Harkins other than disputes which Harkins can arbitrate against Hilton via Article 38 of the prime contract. (A 48, 52)

The District Court relied on the language of Paragraph 2 of the form Subcontract which provides in part that the "[s]ubcontractor shall be bound by all provisions of these documents and also by applicable provisions of the Principal Contract to which the Contractor is bound, and to the same extent" (A 47-48) and concluded that this language, in spite of the Subcontract's "all disputes" arbitration provision at Paragraph 17, "bar[red] Waldinger from arbitrating disputes under the Subcontract if Harkins could not do the same under the primary contract." (A 48) In so holding the District Court relied upon, and deferred to, an affidavit submitted by John F. Harkins, Harkins' president, which represents that Paragraph 2 of Harkins' form Subcontract was designed, among other things, "to assure that subcontractors have no greater rights and remedies against Harkins under the Subcontract form than Harkins has against owners or general contractors under principal contracts." (A 48-49)

Waldinger filed its Notice of Appeal on October 17, 1985 and appealed the decision of the District Court to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1292(a)(1). The Third Circuit heard oral argument on June 3, 1986 and issued its Opinion of the Court dated July 14, 1986 and written by Judge Aldisert. (A 1-14) Judge Garth filed a dissenting opinion. (A 14-26)

The majority found that the District Court's review of the parties' Subcontract and the resultant determination of the existence and scope of the agreement to arbitrate constituted "contract interpretation", as opposed to "contract construction", and held that its review was restricted by the clearly erroneous standard. (A 7) Applying that standard, the majority held that the District Court's "interpretation" was not clearly erroneous. (A 7, 14)

Further, in response to Waldinger's citation to this Court's opinion in *Moses H. Cone Memorial Hospital v. Mercury Constr. Co.*,

460 U.S. 1 (1983) and the admonitions contained therein regarding the strong federal policy favoring arbitration, the majority held that *Cone's* mandates are of no effect outside the environment of labor law and that district courts are not bound by *Cone* where "interpreting" contract language in their arbitrability determinations:

> Waldinger also argues that because of the strong federal interest in promoting arbitration, a court should favor a finding of arbitrability. We are uncertain that arbitration is afforded such a stated preference beyond the environment of labor arbitration. *See United Steel Workers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here."); *Goodwin v. Elkins & Co.*, 730 F.2d 99, 108 (3d Cir. 1984) (Arbitrability . . . is purely a matter of contract."). *But see Moses H. Cone v. Mercury Construction Co.*, 460 U.S. 1, 25 (1983) ("[D]oubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of wavier . . . ."). We do not believe that the rule stated in *Cone* applies here where in interpreting the language of the contract the District Court was performing a fact finding function.

(A 13-14)

Judge Garth dissented as to the proper standard of review and also found that, even under the clearly erroneous standard of review, the District Court's Order should have been reversed. (A 16) Noting that the dispute deals with the legal meaning of the entire contract, not the meaning of particular words, and therefore presents a question of contract construction, as distinct from a question of interpretation, Judge Garth determined the issues on appeal should have been subject to plenary review. (A

15-16) Judge Garth noted the patent infirmity in the majority's position that this Court's decision in *Cone* and the strong federal policy favoring arbitration as embodied in the Federal Arbitration Act ("Arbitration Act") are limited to the environment of labor disputes; *Cone* itself involved the arbitration clause of a construction contract. (A 17) In addition, Judge Garth reviewed various principles of contract interpretation and construction (A 20-26) and determined that, "even absent the dictates of *Cone* and the congressional policies attending the Arbitration Act, basic principles of contract construction mandate reversal here." (A 17)

The majority's holding was four-tiered: first, that the District Court was not bound by this Court's mandates in *Cone* concerning the implementation of the strong federal policies favoring arbitration because it was "interpreting" the parties' contract, purportedly a fact finding function to which the Third Circuit held *Cone's* dictates do not apply; second, that the District Court in determining the existence, scope and legal effect of an "all disputes" arbitration agreement was engaged in a fact finding function, rather than contract construction and, consequently, the clearly erroneous standard of review was applicable; third, that the strong federal policy favoring arbitration as articulated by this Court in *Cone* is limited to disputes emanating from the environment of labor arbitration and does not apply to the arbitration of commercial disputes outside the labor context; and fourth, that the District Court's determination that the incorporation by reference provision contained in the parties' Subcontract superceded and negated the "all disputes" language contained in the Subcontract was not clearly erroneous.

Waldinger's Petition for Panel Rehearing and Rehearing In Banc was denied on August 20, 1986. (A 57-58)

REASONS FOR GRANTING THE WRIT

1. The Third Circuit's holding that district courts engaged in contract "interpretation" in determining the existence and scope of an agreement to arbitrate under the Federal Arbitration Act are not bound by the strong federal policies favoring arbitration conflicts with prior decisions of this Court.

The opinion of the majority below is in direct conflict with principles articulated by this Court in *Moses H. Cone Memorial Hospital v. Mercury Constr. Co.*, 460 U.S. 1 (1983). The majority below held that district courts are not bound by *Cone* where in attempting to ascertain the existence and scope of an agreement to arbitrate the district court is "interpreting the language of the contracts [and] performing a fact finding function." (A 14) Having so held, the majority refused to review whether the District Court applied *Cone* in its "interpretation" of the parties' agreement to arbitrate and itself refused to apply *Cone* in its review of the District Court's determination pursuant to the clearly erroneous standard. (A 13-14)

In *Cone*, this Court articulated what has since become perhaps the most frequently quoted language memorializing this Court's mandate regarding the effectuation of the strong federal policy favoring arbitration of disputes pursuant to the Arbitration Act:

> Although our holding in *Prima Paint* extended only to the specific issue presented, the Courts of Appeals have since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.[1]

This Court's directive is clearly designed to apply to all trial and appellate courts engaged in the implementation of the federal substantive law and policies of the Arbitration Act. The majority below held that district courts are not obligated to employ *Cone's* dictates when engaged in contract interpretation, which the majority holds constitutes fact finding, in their endeavors to ascertain the existence and scope of an agreement to arbitrate. Consequently, where questions of arbitrability

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[1] *Cone*, 460 U.S. at 25.

involve any fact finding functions by a district court, that inquiry *and* the review of that inquiry are to be undertaken without regard for the mandates of *Cone*. These holdings fly squarely in the face of *Cone* and its progeny.

Seizing upon the amorphous distinction between contract interpretation and contract construction, the majority below held that because the District Court was "interpreting" rather than "construing" the parties' Subcontract it was finding fact. The majority held it was restricted to review the District Court's contract analyses pursuant to the clearly erroneous standard.[2] (A 7) The majority found the District Court was "interpreting" because it was "determining the intent of the parties regarding arbitration." (A 7) Assuming, for purposes of argument, that the majority's characterization of the District Court's function of contract interpretation is correct, if the contact interpretation/ construction dichotomy can be accurately and predictably made,[3] the Court erred in holding that the principles articulated

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[2]The majority held that "[c]ontract interpretation is a question of fact, and review is according to the clearly erroneous standard." (A 4) In support, the majority cites *Ram Construction Company, Inc. v. American States Insurance Company*, 749 F.2d 1049 (3d Cir. 1984). *Ram*, however, does not hold that contract interpretation, or any decision making process which can be characterized as contract interpretation, is a pure question of fact, or that review of contract interpretation decisions is limited to the clearly erroneous standard.

Ram held that the determination reviewed in that case involved the resolution of an issue of "construction" rather than an issue of "interpretation" of a contract. *Ram* did not, at any point, address, nor was it required to address, the issue of whether or not a court's function in *contract interpretation* involves purely fact finding functions. In fact, after stating that interpretation by a trial court "of a factual matter" is reviewable on a clearly erroneous basis, the *Ram* court immediately stated:

> Sometimes there is, however, a mixed question of law and fact in which the legal operation of words is intertwined with their interpretation. When that occurs, the reviewing court should separate the issue into its respective parts, applying the clearly erroneous test to the factual component, the plenary standard to the legal. [citation omitted].

749 F.2d at 1053.

[3]Even the panel of the Third Circuit below was split on the question of whether the District Court was engaged in contract "interpretation" or "construction". (A 7, 16) Indeed, even Professor Patterson, cited by the majority as authoritative on the question of the interpretation/construction distinction (A 6), does not grasp with equal clarity the majority's distinction between the two functions. Professor Patterson unequivocably states:

> Can we say that interpretation is a matter of pure fact and construction is a

in *Cone* do not apply to that, or any fact finding function which attends a determination of the existence or scope of an agreement to arbitrate. The majority, without authority or discussion, holds that *Cone* governs only the legal reasoning process of district courts (an even then only in the environment of labor arbitration) and does not apply to fact finding aspects of their determinations of arbitrability.

Initially, in defining the breadth of its mandate, this Court in *Cone* specifically calls for the resolution of doubts in favor of arbitration in issues involving "the construction of the contract language itself", and this Court's use of the phrase "language itself" would be redundant and superfluous unless it was meant to apply to the *process* of determining the meaning of the language used, which process the majority below characterized as contract "interpretation." That the holding in *Cone* applies to contract language interpretation issues, even where they are factual rather than legal issues, is clear from *Cone's* express application to "an allegation of waiver, delay, or a like defense to arbitrability." Issues of "waiver" and "delay", which were present in *Cone* are primarily, if not entirely, factual issues. In addition, this Court's further reference to "a like defense to arbitrability" indicates that other defenses, without regard to their nature as factual or legal, are to be "resolved in favor of arbitration." The majority's holding that doubts arising in the contract interpretation process (if the process is indeed wholly or partly a fact finding function) need not be resolved in favor of arbitration cannot be reconciled with the clear holding of *Cone.*

The above-quoted language from *Cone* is followed by a foot-

> matter of pure law? *No, because interpretation (of a legal instrument) is meaningless without some one or more possible legal consequences as ends-in-view;* and because construction does not operate without regard to some facts, including not only the terms of the contract but also its transactional context.
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> * * *
>
> The distinction between interpretation and construction of contracts has been doubted or rejected, principally, it is believed, for two reasons: First, because *it is difficult or impossible to draw the line between the two in many problematic cases,* and secondly, because many courts and many cases have ignored the distinction.

Patterson, *The Interpretation and Construction of Contracts,* 64 COLUM. L. REV. 833, 836-37 (1964) (emphases supplied).

note[4] wherein this Court cites with approval the opinion of the Third Circuit in *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH,* 585 F.2d 39 ,43-45 (3d Cir. 1978). That holding provides guidance as to the scope of the *Cone*-mandated policy favoring arbitration:

> Thus, the question of whether, in contracts involving commerce, there is an agreement to arbitrate an issue or dispute upon which suit has been brought is governed by federal law. Concomitantly, questions of *interpretation* and *construction* of such arbitration agreements are similarly to be determined by reference to federal law. [citations omitted] As the court in *Coenen v. R. W. Pressprich & Co.,* 453 F.2d 1209, 1211 (2d Cir. 1972), stated, "[o]nce a dispute is covered by the [Federal Arbitration] Act, *federal law applies* to all questions of [the arbitration agreement's] *interpretation, construction, validity, revocability and enforceability."* [citations omitted].

Id. at 43 (emphases supplied).

Cone requires that, in case of *any* doubts concerning arbitrability, whether those doubts are of a factual or legal nature, the matter must be referred to arbitration and it is reversible error to fail to do so. The application of *Cone's* holding to the decision-making processes of the District Court and the majority below evidences the patent infirmity of both. A fundamental element of the analysis of the District Court and the majority is that certain terms of the contract are ambiguous, i.e., that there is *doubt* as to the meaning of such terms. (A 7) Thus, resort was made to Harkins' affidavit. (A 10) *Cone* requires the District Court, at the point of entertaining those doubts, to resolve such doubts in favor of arbitration rather than rely upon extrinsic evidence such as the conclusory affidavit of a party which, after drafting the arbitration provision, desires to avoid it.[5] The District Court ack-

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[4]*Cone,* 460 U.S. at 25 n. 31.

[5]The majority's endorsement of the District Court's resort to the affidavit of Harkins is wholly inappropriate due to the immaterial and inadmissable nature of the content of the affidavit as dictated by the parol evidence rule. A court's "function in construing [a] contract is to determine the parties' intent from what they said and not what they meant to say." *Johnson Controls, Inc., v. City of Cedar Rapids, Iowa,* 713 F.2d 370, 375 (8th Cir. 1983) *Cf. Commercial Metals Co. v. United States,* 176 Ct. Cl. 343, 349-53 (1966) (per curiam) (a par-

nowledged doubt concerning the issues which it was required to decide and, having acknowledged those doubts, failed to follow the dictates of *Cone*. The majority below permitted and endorsed such action and places itself in direct conflict with *Cone*.

The distinction drawn by the majority below raises important questions that have not been directly addressed by this Court and which have far reaching impact. Initially, do the federal substantive law of the Arbitration Act and the policies articulated in *Cone* forbid a federal court of appeals from applying the contract construction/interpretation dichotomy as the "litmus test" for dictating the standard of review to be applied to a district court's determination of arbitrability under the Arbitration Act? Moreover, can a district court, as the majority holds, ignore the federal policies favoring arbitration and the mandates of *Cone* because it engages in "fact finding" (contract interpretation) in its quest to determine arbitrability?

This case provides a ready vehicle for the resolution of these issues which, if left unresolved, will serve as a blueprint for the circumvention of this Court's express directives in *Cone* by district courts and courts of appeals alike. In view of the wide use of arbitration agreements, both in the construction industry and other commercial contexts outside of the labor environment, the majority's holdings and the far reaching ramifications that will flow therefrom, are particularly significant.

2. The decision below that the District Court's contract "interpretation" determination concerning the existence and scope of an agreement to arbitrate disputes was reviewable pursuant to the clearly erroneous standard is in conflict with decisions of this Court and other circuits.

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ty's historical practice and subjective intent, which have not been incorporated into the written contract, cannot be used to modify the language actually used in the written contract). More disturbing is the majority's reference to the content of the affidavit and the majority's statement that it "is strong evidence of the contracting parties' intent. Significantly, there was no rebuttal to this evidence." (A 10) Initially, *Harkins'* affidavit sets forth the purported intent of *Harkins*, not of the parties. Moreover, it would have been patently disingenuous for *Waldinger* to rebut *Harkins'* articulation of *Harkins'* purported intention in drafting Paragraph 2 of the Subcontract since there was no evidence that Harkins communicated or that Waldinger shared or even knew of Harkins' construction. The majority's attachment of significance to the absence of such a rebuttal is misplaced.

The majority below held that the District Court's legal determination concerning the existence and scope of an agreement to arbitrate consisted of contract "interpretation" rather than contract "construction" and was reviewable only pursuant to the clearly erroneous standard. (A 7) This holding conflicts with the standard of review endorsed by this Court and applied by other federal courts of appeals to questions of contract interpretation and evidences a misapprehension and misapplication of this Court's decision in *Anderson v. City of Bessemer,* 470 U.S. 564 (1985).

In conflict with the decision below is *Explo, Inc. v. Southern Natural Gas Co.,* 788 F.2d 1096, 1098-99 (5th Cir. 1986). There the Fifth Circuit undertook a wholesale review of the District Court's *interpretation* of an arbitration provision and remanded with instructions to the lower court that it order the disputes be submitted to arbitration. Noting that questions of contract interpretation and whether a provision is inherently ambiguous *both* present questions of law and, further, that contract *interpretation* is a matter for the court, the Fifth Circuit cited this Court's directive in *Cone,* conducted a *de novo* review of the question of arbitrability and reversed the District Court's interpretation of the arbitration provision.[6]

Admitted confusion and, consequently, divergent views, exist among the circuits with respect to the standard of review applicable to questions of interpretation of contracts where true fact

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[6]788 F.2d at 1098-99; *See also Diamond Fruit Growers, Inc. v. Krack Corporation,* 794 F.2d 1440, 1442 (9th Cir. 1986) ("Metal-Matic's contention that its disclaimers are part of its contract with Krack presents questions of statutory and contract interpretation, which are questions of law reviewed *de novo.*"); *Hancock Laboratories v. Admiral Insurance Co.,* 777 F.2d 520, 522 (9th Cir. 1986) ("The principles of contract interpretation to be applied are reviewed *de novo.*"); *Dugan & Myers Constr. Co., Inc. v. Worthington Pump Corp.,* 746 F.2d 1166, 1168 (6th Cir. 1984) *cert. denied,* 105 S.Ct. 2675 (1985) ("As to the interpretation and construction of the subcontract, the clearly erroneous rule does not apply."); *Marchese v. Shearson Hayden Stone, Inc.,* 734 F.2d 414, 418-19 (9th Cir. 1984) ("A district court's decision to compel arbitration of a claim depends on an interpretation of the arbitration agreement and a determination that the matter in question is appropriate for arbitration. Both determinations are questions of law subject to *de novo* review."); *Atlas Pallet, Inc. v. Gallagher,* 725 F.2d 131, 134 (1st Cir. 1984) ("Thus because construction of an insurance policy is a question of law, a reviewing court is not bound by the interpretation given to the policy by the trial court."); *International Union v. General Electric Co.,* 714 F.2d 830, 832 (8th Cir. 1983) ("Interpretation of a contract is a matter of law and is not, therefore subject to the 'clearly erroneous' standard of review by this court.").

finding has been involved at the district court level.[7] The courts of appeals need guidance from this Court as to the standard of review to be applied when a district court has interpreted or construed an agreement to arbitrate or conducted any fact finding attending a determination of arbitrability.

A review of *Cone* clearly indicates that the federal policy favoring arbitration was intensified by this Court's endorsement of the Fourth Circuit's unbridled inquiry into the issue of arbitrability. This was so even where the District Court had not entertained and disposed of the issue itself.[8] The Fourth Circuit conducted a *de novo* inquiry into the question of arbitrability and entertained the respondent's challenges to arbitrability founded in waiver, estoppel and laches;[9] clearly issues which are questions of fact. This Court sanctioned the Fourth Circuit's inquiry, disposition and direction to the District Court.[10] The Fourth Circuit's determination of arbitrability provided the springboard for this Court's mandate concerning the vigor with which the federal policies favoring arbitration must be effected. This Court's language in *Cone* was carefully and broadly crafted to

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[7]*See, e.g., Kern Oil & Refining Co. v. Tenneco Oil Co.*, 792 F.2d 1380, 1383 (9th Cir. 1986) ("When an appellate court restricts its review of the trial court's interpretation of a contract to an analysis of the language used in the contract, the issue of interpretation is a matter of law and freely reviewable .... When an interpretation includes a review of factual circumstances surrounding the contract the principles of contract interpretation applied to those facts present issues of law which this court can freely review. When the inquiry extends beyond the words of the contract and focuses on related facts, however, the trial court's consideration of extrinsic evidence is entitled to great deference and its interpretation of the contract will not be reversed unless it is clearly erroneous."); *Supre v. Ricketts*, 792 F.2d 958, 961 (10th Cir. 1986) (Where mixed question of fact and law primarily involves the consideration of legal principles, then a *de novo* review by the appellate court is appropriate. If the mixed question primarily involves a factual inquiry, the clearly erroneous standard is appropriate.); *Southern Natural Gas Co. v. Pursue Energy*, 781 F.2d 1079, 1081 (5th Cir. 1986) (The interpretation of an unambiguous contract is a matter of law; the interpretation of an ambiguous contract is a matter of fact; the district court's determination of ambiguity is a question of law subject to *de novo* review.).

[8]Petitioner is not unmindful of the strong dissent of then-Chief Justice Burger, then-Justice Rehnquist and Justice O'Connor. That dissent, however, was grounded in the question of the Fourth Circuit's appellate jurisdiction of an issue not yet decided in the District Court. The dissenters did not contest this Court's strong endorsement of the federal policies underlying the Arbitration Act. Indeed, the *Cone* dissenters' joinder in this Court's opinion in *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, _____ U.S. _____, 87 L.Ed.2d 444, 105 S.Ct. 3346 (1985) evidences this Court's unanimity in its desire to effect the mandates of *Cone*.

[9]*In Re Mercury Constr. Corp.*, 656 F.2d 933, 938-43 (4th Cir. 1981).

[10]*Cone*, 460 U.S. at 29.

extend the federal policy favoring arbitration to *any* doubts concerning arbitrability, without regard to their characterization as questions of law or fact or their entertainment at the trial or appellate levels.[11]

In addition, this Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, ___ U.S. ___, 87 L.Ed.2d 444, 105 S.Ct. 3346 (1985) recently endorsed the First Circuit's *de novo* inquiry into the scope and operation of an arbitration clause previously reviewed, analyzed, construed and interpreted by the District Court. There, the District Court ordered arbitration of most of the issues raised in the complaint, including federal anti-trust issues.[12] The First Circuit affirmed in part but reversed insofar as the District Court ordered submission of the anti-trust claims to arbitration.[13] This Court affirmed the First Circuit's affirmance of the District Court, but reversed the First Circuit's finding that respondent's anti-trust claims were not arbitrable pursuant to the Arbitration Act.

The *Mitsubishi* Court's endorsement of the First Circuit's *de novo* inquiry into the issue of arbitrability and review of the determination of arbitrability as found by an interpretation of the agreement, directly contradict the majority's retreat to the clearly erroneous standard in the instant case. More specifically, the First Circuit in *Mitsubishi* indicated that "[its] analysis of the arbitration clause [was] guided by two basic principles. First, the scope of the clause as it appears on the face of the contract is a question of law for our independent determination and not, as Mitsubishi argues, one of fact reversible only for clear error. Second, all doubts are resolved in favor of arbitration; arbitration will be ordered 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' "[14]

Clearly, the First Circuit in *Mitsubishi* entertained and rejected the contention that the District Court's findings were subject to

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[11] *Id.* at 25.

[12] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 723 F.2d 155, 158 (1st Cir. 1983).

[13] *Id.* at 169.

[14] *Id.* at 159.

review pursuant to the clearly erroneous standard.[15] More significantly, this Court, in endorsing the First Circuit's review, held that "the Court of Appeals correctly conducted a two-step inquiry, first determining whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding it did, considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims. We *endorse* its [the First Circuit's] rejection of Soler's [one of the party's] proposed rule of arbitration-clause construction."[16]

That the First Circuit in *Mitsubishi* conducted a plenary review of what the majority below would characterize as contract "interpretation" is clear.[17] Indeed, on review, this Court noted that "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."[18] This language is further evidence that *Cone's* mandates apply to determinations of intent surrounding the existence or scope of an agreement to arbitrate regardless of whether made in the process of contract interpretation or construction.[19]

The majority's decision below also evidences a misapprehension and misapplication of this Court's decision in *Anderson v.*

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[15]The First Circuit's review of the District Court's entertainment of the issues of arbitrability was conducted *de novo*. The First Circuit began by noting that "Soler argues that it never specifically agreed to arbitrate controversies that arose under such statutes as the Sherman Act. Soler, however, mistakes the nature of *our inquiry*. . . . The question, therefore, is not whether the arbitration clause mentions antitrust or any other particular cause of action, but whether the factual allegations underlying Soler's counterclaims - and Mitsubishi's bona fide defenses to those counterclaims - are within the scope of the arbitration clause, whatever the legal labels attached to those allegations." 723 F.2d at 159 (emphasis supplied).

[16]*Mitsubishi*, _____ U.S. at _____, 87 L.Ed.2d at 456, 105 S.Ct. at 3355 (emphasis supplied).

[17]This Court noted "Soler does not question the *Court of Appeals'* application of ¶VI of the Sales Agreement to the disputes here as a matter of standard contract interpretation." *Mitsubishi*, _____ U.S. at _____, 87 L.Ed.2d at 453, 105 S.Ct. at 3353 (emphasis supplied).

[18]*Mitsubishi*, _____ U.S. at _____, 87 L.Ed. at 455, 105 S.Ct. at 3354.

[19]Significantly, this Court approved the First Circuit's role in entertaining the issue of arbitrability noting that "Soler does suggest that... [the arbitration clause] should be read narrowly to exclude the statutory claims.... Thus, insofar as the allegations underlying the statutory matters covered by the enumerated articles, the *Court of Appeals* properly resolved any doubts in favor of arbitrability." *Mitsubishi*, _____ U.S. at _____, 87 L.Ed.2d at 454 n. 13, 105 S.Ct. at 3353 n.13 (emphasis supplied) *citing* 723 F.2d at 159.

City of Bessemer, supra. In *Anderson* this Court held that the clearly erroneous test is to be applied to the review of a district court's finding of fact even where that effort involves the review of physical or documentary evidence. But *Anderson* does not hold that merely because a district court bases its determination, either in whole or in part, on documentary evidence that it is necessarily engaged in finding fact. This Court's opinion in *Anderson* was not designed to alter the standard of review in contract interpretation matters simply because interpretation involves a review of documentary evidence - the contract itself.[20] If such were the case plenary review by a federal court of appeals would no longer exist in contract disputes. Commercial stability based upon the predictability of contract interpretation would be gravely undermined.

The majority's holding encourages the burdening of federal courts, at both the trial and appellate court levels, with an increasing flood of "intent" affidavits attacking the existence, scope and enforceability of agreements to arbitrate. The majority's characterization of the District Court's undertakings as fact finding and its application of the clearly erroneous standard raise important questions that have apparently not been resolved by this Court with sufficient explicitness. Should district courts be allowed to permissibly ignore the mandates of *Cone* and simultaneously insulate themselves from plenary review by characterizing their activity as contract "interpretation" and resorting to extrinsic evidence to assist in ascertaining the parties' intent knowing that by doing so they can ensure that even the decision to resort to extrinsic evidence (i.e. finding the existence of ambiguity) will not be subject to *de novo* review?"[21]

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[20]Simply because a district court is attempting to find the "intent" of the parties does not render the task one of fact finding. Indeed, unless ambiguous, the contract documents are reviewed pursuant to principles of contract interpretation and construction to glean the parties' intent. The clearly erroneous standard does not inhibit an appellate court's power to correct errors of law. Where the parties are in disagreement as to the legal implications to be drawn from the facts an appellate tribunal has broad authority to substitute its own conclusions of law for those of the trial court. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984).

[21]Even marginally astute counsel will recognize the opportunity the Third Circuit's opinion provides for dictating the standard of review of contract construction and interpretation issues on appeal. The Third Circuit holds that by resorting to extrinsic evidence, in

Second, is the standard specifically mandated by *Cone* and reaffirmed in *Mitsubishi* eviscerated by the general standard of Rule 52(a) such that courts of appeals should resolve doubts *against* arbitrability unless a district court's "interpretation" of the arbitration agreement is clearly erroneous? The majority below indulges in reasoning which yields an affirmative, and patently unsound, response to both.

3. The Third Circuit's holding that the strong federal policy favoring arbitration is restricted to the environment of labor disputes not only directly conflicts with decisions of this Court and other federal courts of appeals but effectively eviscerates the efficacy of the Federal Arbitration Act and its attendant policies as they relate to agreements to arbitrate disputes in the commercial context.

The majority opinion below expressly refused to adhere to *Cone's* mandates concerning the resolve with which courts must implement the strong policies attending the Arbitration Act in the commercial context. In response to Waldinger's repeated citation to *Cone* and the strong federal policy favoring a finding of arbitrability, the majority noted that it was "uncertain that arbitration is afforded such a stated preference beyond the environment of labor arbitration" and cited *Cone* as authority directly addressing and conflicting with this "uncertainty." (A 13)

The majority's declaration that the federal policy favoring arbitration is limited to the environment of labor arbitration is patently infirm. *Cone* involved the arbitration clause of a *construction* contract. The majority's view not only runs head-on with *Cone* but is belied by the plethora of case law from this Court and other circuits which adopts, embraces and applies the *Cone* mandate in a wide variety of non-labor contexts as this

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affidavit form, of one party's purported "interpretation" of certain contract provisions the district court is indulging in "fact finding" or contract "interpretation" which is subject, on appeal, to review pursuant to the clearly erroneous standard. The practical effect of this holding and its logical extension yield absurd results. For example, an insurance company litigating the scope of a provision in a policy issued and drafted by it may, under the Third Circuit's reasoning, submit an affidavit to the district court purporting to articulate *its* interpretation of the intended scope of the provision and consequently, the question of coverage. If resort is had by the district court to the affidavit and an "interpretation" made in favor of the insurance company the Third Circuit's opinion would hold that its review of the district court's disposition of the issue of coverage would be restricted to the clearly erroneous standard.

Court clearly expressed and intended.[22]

The Third Circuit's express refusal to implement the federal policy favoring arbitration outside the context of the labor environment conflicts directly with this Court's holding in *Cone*. Its holding sanctions a departure from the application of those policies in non-labor commercial contexts where agreements to arbitrate are commonplace. This Court should issue certiorari to resolve any confusion or uncertainty which may burden the courts of appeals concerning the nature or identity of the environments in which the strong federal policy favoring arbitration applies and to resolve confusion concerning the policies' application to all issues surrounding the formation, construction, interpretation and implementation of agreements to arbitrate in any commercial context or environment.

4. The Third Circuit's holding that an "all disputes" arbitration provision contained in a subcontract can be rendered inoperative by the subcontract's "incorporation by reference" provision merely because the incorporated prime contract does not have a similar "all disputes" provision has such a far reaching effect upon the viability of arbitration agreements in the commercial context that it warrants an exercise of this Court's power of supervision.

This Court should exercise its power of supervision over federal courts to remedy the Third Circuit's endorsement of the District Court's radical departure from the policies attending the Arbitration Act and applicable principles of contract construction. *See* Sup. Ct. R. 17.1(a); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 570-71 (1979).

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[22]*See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, _____ U.S. _____ 87 L.Ed.2d 444, 105 S.Ct. 3346 (1985) (arbitration agreement in automobile sales distribution agreement); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 84 L.Ed.2d 158, 105 S.Ct. 1238 (1985) (agreement to arbitrate disputes arising out of securities account); *Fisher v. A. G. Becker Paribas, Inc.*, 791 F.2d 691 (9th Cir. 1986) (stock investor-broker agreement); *Miller Brewing Company v. Fort Worth Distributing Co.*, 781 F.2d 494 (5th Cir. 1986) (arbitration provision in beer distributing agreement); *Rush v. Oppenheimer & Co.*, 779 F.2d 885 (2d Cir. 1985) (stock investor-broker agreement); *Willoughby Roofing & Supply v. Kajima Int'l*, 776 F.2d 269 (11th Cir. 1984) (arbitration provision in construction contract); *County of Durham v. Richards & Associates*, 742 F.2d 811 (4th Cir. 1984) (arbitration provision in construction contract); *Exchange Mutual Insurance Co. v. Haskell Company*, 742 F.2d 274 (6th Cir. 1984) (surety bound by arbitration clause incorporated by reference into subcontract which was, in turn, incorporated into performance bond).

The District Court's, and the majority's, holdings concerning the effect of an incorporation by reference provision upon a subcontract's arbitration provision effectively render nugatory those arbitration provisions existing in the incorporating document. These holdings threaten upheaval to virtually all subcontract arbitration agreements and create an irreversible chilling effect on their utilization in the construction industry. Thousands upon thousands of subcontracts are entered into every year in the construction industry containing some form of incorporation by reference provision. Pursuant to the majority's holding, any "agreement" to arbitrate found in a subcontract containing an incorporation by reference provision is illusory and misleading. A right to arbitrate under such subcontracts depends not on the subcontract provision but upon the existence of similar or greater arbitration rights in an incorporated document.

The majority's holding, as Judge Garth aptly noted in dissent, contravenes numerous general principles of contract construction and interpretation. (A 20-25) Where two provisions of a contract are inconsistent, it is a basic principle of contract law that general language (Paragraph 2 of the Subcontract) must yield to the more specific ("all disputes" language of Paragraph 17). *Affiliated Food Distr., Inc. v. Local Union No. 229,* 483 F.2d 418 (3d Cir, 1973); Corbin on Contracts, §547; Restatement 2d Contracts §203. Further, it is a basic tenet of contract construction and interpretation that all contract provisions (Paragraphs 2 and 17 and Articles 37 and 38) are to be read together so as to give force and effect to each rather than one to the exclusion of another. Restatement 2d Contracts §203(a); *Schultz v. Onan Corp.,* 681 F.2d 177 (3d Cir. 1983); *Johnson Controls, Inc. v. City of Cedar Rapids, Iowa,* 713 F.2d 370, 374 (8th Cir. 1983); *SCM Corp. v. United States,* 675 F.2d 280, 283 (Ct. Cl. 1982). The District Court's construction of Paragraph 2 of the Subcontract contravenes this basic principle and always renders Paragraph 17 without effect. (A 23-24)

These principles of contract law are regularly applied to situations in the construction industry where subcontracts incorporate a prime contract by reference. The Fifth Circuit has held that "while a reference in a subcontract to the provisions, plans and specifications of a general contract imports them into the

subcontract where not inconsistent with its terms, it is quite well-settled that such a reference is not effective beyond this, and that if the subcontract contains words of definite limitation, they will be given effect and the reference limited accordingly." *Perry v. United States,* 146 F.2d 398, 400 (5th Cir. 1945). In *John W. Johnson, Inc. v. Basic Constr. Co.,* 429 F.2d 764, 772 (D.C. Cir. 1970), the D.C. Circuit held similarly, stating that "even if the prime contract were fully incorporated into the subcontract, its general provisions would not overcome the specific provisions of the subcontract."

And, in *McKinney Drilling Co. v. Collins Co.,* 517 F.Supp. 320 (N.D. Ala. 1981), *aff'd,* 701 F.2d 132 (11th Cir. 1983), the District Court for the Northern District of Alabama construed a clause of a subcontract which provided that the "contractor shall have the same rights and privileges against the subcontractor as the owner has against the contractor." It was contended that the provisions of the specifications contained in the prime contract controlled over the terms of the subcontract. The court held:

> [D]efendent's contention . . . is legally unsound. Numerous cases have held that a subcontractor is free to contract in any manner that it desires; and if the specific provisions of the subcontract conflict with the plans and specifications, or with the general contract between the prime contractor and the owner (all of which are incorporated into the subcontract), the terms of the subcontract prevail.[23]

517 F.Supp. at 325.

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[23]*See also Dugan & Meyers Constr. Co. v. Worthington Pump Corp.,* 746 F.2d 1166, 1174 (6th Cir. 1984), *cert. denied,* 86 L.Ed.2d 694, 105 S.Ct. 2675 (1985) ("The fact that Worthington's warranty terms conflicted with the warranty in the general contract with the District is of no significance since a subcontractor is free to contract in any matter it desires and in case of conflict, the terms of the subcontract prevail."); *Washington Metropolitan Area Transit Authority v. Norair Engineering Corporation,* 553 F.2d 233, 235 (D.C. Cir. 1977); *United States Steel Corp. v. Turner Constr. Co.,* 560 F.Supp. 871, 873-74 (S.D.N.Y. 1983) ("Courts which have construed similar contractual provisions have held under analogous factual situations that absent clear language to the contrary, similar incorporation clauses in a construction subcontract bind a subcontractor only to the prime contract provisions which relate to the scope, quality, character and manner of the work to be performed by the subcontractor. Prime contract provisions unrelated to the work of the subcontractor, such as a 'dispute' clause governing the resolution of monetary claims between the project owner and general contractor, are not incorporated by reference into the subcontract.").

The majority's opinion creates a conflict among the circuit courts with respect to the issue of the order of precedence of an incorporating document vis-a-vis an incorporated document. Outside the Third Circuit conflicting terms of the incorporated document must yield to the incorporating document. In contrast, the majority below holds that an incorporated document operates to negate and supercede the incorporating document. This is so, the majority holds, even where the incorporating document contains an unambiguous "all disputes" arbitration provision subject to interpretation in accordance with the policies attending the Arbitration Act and where the incorporating and incorporated documents can readily be construed harmoniously.[24]

Finally, the District Court erred in resorting to Harkins' affidavit to ascertain the *legal effect* of Paragraphs 2 and 17 of the Subcontract. As previously stated, the parties' "all disputes" arbitration provision is unambiguously set forth in the Subcontract. Significantly, the District Court neither made, nor purported to make, *any* findings concerning the parties' intent vis-a-vis Paragraph 17. Yet the majority declined to review the issue of Paragraph 17's effect on a plenary basis. Instead, the District Court allowed Harkins to dictate, *not* merely Harkins' intent in drafting Paragraph 2 of the Subcontract, but the *legal effect and operation* of Paragraph 2 of the Subcontract upon a clear and unambiguous arbitration agreement in Paragraph 17.[25] Not only was the determination of this question of law abdicated by the District Court, it was then left unreviewed by the Third Circuit pursuant to the plenary standard which it warranted.

By allowing the District Court to ignore fundamental principles and rules of contract construction and interpretation, by

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[24]The majority also refused to construe *any* provisions in the Subcontract against Harkins, its drafter, holding such to be a rule of contract "construction" inapplicable to a determination involving contract "interpretation." (A 13 n. 2)

[25]Paragraph 17 of the Subcontract is an unambiguous "all disputes" arbitration provision. In *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*, 388 U.S. 395 (1967) this Court adopted the Second Circuit's concept of "separability" which counsels that "arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are imbedded [and] a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud." *Id.* at 402. Similarly, the "all disputes" arbitration agreement of Paragraph 17 in the instant matter dictates that any challenge to the provision's vitality, extrinsic to the provision itself, it a question for arbitration.

sanctioning and encouraging such conduct by characterizing the issues as factual and reviewable only under the clearly erroneous standard and by expressly refusing to apply the policies and standards imposed by the Arbitration Act to its own function or that of the District Court, the Third Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. The Third Circuit has sanctioned a course of judicial proceedings, and itself adopted a position, which totally disregard this Court's mandates as set forth in *Cone* and which, for the first time in the sixty-year history of the Arbitration Act, render invalid and inoperative a facially unambiguous arbitration provision calling for mandatory arbitration of "all disputes."

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted and the decision of the Court of Appeals summarily reversed with an order that the Court of Appeals direct the District Court to order arbitration in accordance with the "all disputes" arbitration provision of the parties' Subcontract, or, alternatively, that the Court of Appeals undertake plenary review of the case below and apply the mandates of *Cone* in its review.

Respectfully submitted,

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October 20, 1986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5695

JOHN F. HARKINS COMPANY, INC.

vs.

THE WALDINGER CORPORATION,

Appellant

Appeal from the United States
District Court for the
District of New Jersey - Camden
(D.C. Civil No. 85-2379)

Argued
June 3, 1986
Before: ALDISERT, *Chief Judge*, and
GARTH and SLOVITER, *Circuit Judges*.
(Filed July 14, 1986)

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OPINION OF THE COURT

ALDISERT, *Chief Judge*.

This appeal involves a dispute between a contractor and subcontractor. The district court held that a seemingly broad arbitration provision set forth in one clause of the subcontract was limited by another subcontract clause which incorporated a narrow arbitration clause contained in the primary or principal contract between the contractor and the project manager. The crucial issue is whether we characterize the function performed by the district court as contract interpretation or contract construction. We hold that the district court was interpreting language contained in the contracts, rather than deciding the legal relations between the parties, and therefore review its determination under the clearly erroneous standard. *Ram Construction Co. v. American States Insurance Co.*, 749 F.2d 1049, 1052-53 (3d Cir. 1984). We further conclude that the court's interpretation was not clearly erroneous and will therefore affirm.

I.

John F. Harkins Co. was one of several primary contractors on the construction project for the Atlantic City Hilton Casino/Hotel. Harkins contracted with Hilton and the construction manager, Tishman Construction Co., to install the heating, ventilation, and air conditioning systems. Harkins subcontracted sheetmetal ductwork to Waldinger Corporation.

On November 9, 1984, Waldinger commenced an arbitration proceeding against Harkins before the American Arbitration Association, pursuant to what it considered a mandatory arbitration clause in the subcontract. Waldinger alleged that Harkins had "changed the conditions, sequence and schedule under which [Waldinger's] work was to be performed . . .," resulting in excess costs to Waldinger, and requested an award of $6 million. App. at 34. Harkins disagreed that this was subject to arbitration. It then initiated this action in New Jersey state court seeking to enjoin the arbitration. Harkins relied on a restrictive arbitration clause in the primary contract, which Harkins maintains was incorporated into its subcontract with Waldinger, a clause that limits arbitration to disputes over signed change orders. Waldinger then removed the state court action to federal district court.

The district court agreed with Waldinger and held that this dispute was not covered by the arbitration clause. It concluded that "the proper interpretation of the disputed contractual provisions limits arbitrability to disputes over signed change orders . . . ." App. at 60. The court determined that this was the primary contract arbitration limitation and that this limitation was incorporated into the subcontract. Because Waldinger's dispute did not involve a signed change order, the court ruled that it was not arbitrable. The court therefore denied Waldinger's motion for a stay of

the district court action pending arbitration, and granted Harkins' motion to stay the arbitration. *Id.* Waldinger appeals. We have jurisdiction under 28 U.S.C.§ 1292(a)(1). *J & R Sportswear & Co. v. Bobbie Brooks, Inc.*, 611 F.2d 29, 29 (3d Cir. 1979); *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, 585 F.2d 39, 42 n.7 (3d Cir. 1978).

II.

Before us Waldinger contends that the district court erred in construing the contract's arbitration language. Although terms of an injunction are normally reviewed for abuse of discretion, any determination that is a prerequisite to the issuance of an injunction, *i.e.*, the term of a contractual arbitration provision, is reviewed according to the standard applicable to that particular determination. *See Weis v. York Hospital*, 745 F.2d 786, 829-30 (3d Cir. 1984). Therefore, the crucial task before us is to decide the appropriate standard of review of the district court's examination of the contractual arbitration provisions.[1] Both Waldinger and and Harkins cite *Ram Construction Co. v. American States Insurance Co.*, 749 F.2d 1049 (3d Cir. 1984), for different standards of review on this issue. We agree that *Ram Construction* controls.

In *Ram Construction*, we distinguished between the standards of review for contract interpretation and contract construction. *Id.* at 1052-53. Contract interpretation is a question of fact, and review is according to the clearly erroneous standard. *Id.* at 1053. In contrast, contract construction is a question of law mandating plenary review. *Id.* Harkins argues

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1. "[F]ederal law applies in construing and enforcing an arbitration clause, even in those cases in which jurisdiction is based on diversity." *Goodwin v. Elkins & Co.*, 730 F.2d 99, 108 (3d Cir. 1984).

that this case turns on interpreting the contract's terms in order to ascertain the intent of the parties. Waldinger contends that the case pivots on construing the contract according to law.

The distinction between interpretation and construction is not always easy. Professor Corbin described the distinction:

> By "interpretation of language" we determine what ideas that language induces in other persons. By "construction of the contract," as that term will be used here, we determine its legal operation -- its effect upon the action of courts and administrative officials. If we make this distinction, then the construction of a contract starts with the interpretation of its language but does not end with it; while the process of interpretation stops wholly short of a determination of the legal relations of the parties. When a court gives a construction to the contract as that is affected by events subsequent to its making and not foreseen by the parties, it is departing very far from mere interpretation of their symbols of expression, although even then it may claim somewhat erroneously to be giving effect to the "intention" of the parties.

3 Corbin, Corbin on Contracts § 534 at 9 (1960) (footnotes omitted). Our opinion in *Ram Construction* further illuminates the distinction between contract interpretation and contract construction. In that case we were faced with the question of whether the provisions of a contract for removal of one rock slide from a roadway covered a subsequent rock slide, or whether the actions of the parties had created a second contract. Speaking through Judge Weis, we said:

> [T]he decision that two separate agreements for slide removal existed was one of contract construction, not interpretation. As the surety states and the record confirms, there are no differences between the parties on the material terms of the Slide II agreement. The amount and type of work, compensation, time and method of carrying out the work, and other details are not contested. No question of interpretation is presented, only the construction of the agreement; that is whether Slide II is to be considered legally part of the December 8, 1982 contract or as a separate agreement.

749 F.2d at 1053. We also quoted Professor Patterson: "'Construction, which may be usefully distinguished from interpretation, is a process by which legal consequences are made to follow from the terms of the contract and its more or less immediate context, and from a legal policy or policies that are applicable to the situation.'" *Id.* (quoting Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 835 (1964)).

III.

In the case at bar, the clash between the contracting parties centered on whether the parties intended that the liberal language of the subcontract's arbitration clause should apply, or whether they intended that the subcontract incorporate the primary contract's arbitration provision. Thus, when we use the *Ram Construction*-Professor Corbin-Professor Patterson nomenclature of "interpreting the contract," in this case this means ascertaining the intent of the parties as to what arbitration clause controlled. We have previously held that this is a question of fact, governed by the clearly erroneous standard. *Matter of Barclay Industries, Inc.*, 736 F.2d 75, 79 (3d Cir.

1984) ("[I]nterpretation of an ambiguous contract . . . is a question of the parties' intent, and thus a question of fact."); *Landtect Corp. v. State Mutual Life Assurance Co.*, 605 F.2d 75, 79 (3d Cir. 1979) ("'Discerning contractual intent' is a question of fact unless the provisions of a contract are 'wholly unambiguous.'" (quoting *Heyman v. Commerce & Industry Insurance Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975)). We therefore conclude that the judicial task performed by the district court here was contract interpretation, i.e., determining the intent of the parties regarding arbitration. The court was required to find as a fact what the contracting parties intended. It had to divine this intent from the language of the contract documents and any extrinsic evidence that went to the issue of intent. Once we review the district court's language interpretation, the legal operation of that interpretation on review follows easily. The proper standard of review has to be whether the district court's findings - interpretation of the contract, that is, the intent of the parties as to the meaning of the contract's language - are clearly erroneous. We hold that its interpretation is not clearly erroneous.

IV.

A.

Harkins and Waldinger disagree over the interpretation of two provisions in the primary contract between Tishman, the construction manager, and Harkins, the heating, ventilation and air conditioning contractor, and two provisions in the subcontract between Harkins and Waldinger, the sheetmetal subcontractors. These provisions describe arbitration of disputes between parties to the two contracts. Section 17 of the Harkins/Waldinger subcontract provides:

> 17. All disputes, claims or questions arising hereunder shall be subject to arbitration and shall be submitted to arbitration in accordance with the provisions, then obtaining, of the Standard Form of Arbitration Procedure of the A.I.A. A determination thereunder shall be final and binding upon the parties thereto. Pending determination, there shall be no work stoppage.

App. at 22. Waldinger contends that this section alone made all disputes arising under the subcontract subject to mandatory arbitration.

In response, Harkins contends that other provisions -- one in the subcontract and two in Tishman/Harkins' primary or principal contract -- limited the scope of arbitration. Harkins relies on Section 2 of the Harkins/Waldinger subcontract which provides:

> 2. Work performed by subcontractor shall be in strict accordance with CONTRACT DOCUMENTS applicable to the work to be performed and materials, articles and/or equipment to be furnished hereunder. SUBCONTRACTOR *shall be bound by all provisions of these documents and also by applicable provisions of the PRINCIPAL CONTRACT* to which the CONTRACTOR is bound, *and to the same extent*. . . .

Id. (emphasis supplied). Harkins argues that the phrase "and to the same extent" in this section limited any mandatory arbitration provision in the subcontract to the scope of those arbitation provisions contained in the primary contract.

Arbitration provisions contained in the primary contract have a much narrower scope than that of the subcontract. Section 37 of the Tishman/Harkins primary contract refers to arbitration in general and

limits arbitration to only those disputes that Clause 38 of the primary contract specifies as arbitrable:

> 37. In any case in which it is provided by the terms of this contract that any specific dispute or specific payment to be made shall be determined by arbitration, such arbitration shall be conducted in the City in which the Site is located in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrators may be entered in any Court having jurisdiction thereof.

Id. at 17. The only clause of the primary contract that permits arbitration is Section 38, which specifies arbitration for disputes over written change orders:

> 38. The owner, without invalidating this contract, may order extra work or make changes by altering, adding to or deducting from the work, the Contract Price to be adjusted accordingly. The Contractor shall not make any alterations or omit anything, or perform additional or extra work, except upon written order signed by the Owner. . . .
>
> . . . .
>
> In case of disagreement as to the amount to be paid or allowed, the Contractor shall promptly comply with the order and the amount shall be determined by arbitration as herein provided.

Id. at 17-18.

B.

After considering these provisions and other evidence relating to the parties' intent, the district court determined that:

> The only real issue for the court to resolve is whether Waldinger can submit issues for arbitration under the subcontract when Harkins could not seek arbitration of the same issues under the primary contract, given the fact that section 2 of the subcontract binds Waldinger, the subcontractor, *to the same extent* to which Harkins is bound under the primary contract. We believe that the correct interpretation bars Waldinger from arbitrating disputes under the subcontract if Harkins could not do the same under the primary contract.

Id. at 58. In addition to its examination of the contracts, the district court relied on an affidavit of John F. Harkins, President of Harkins Co., as evidence of the parties' intent:

> The provision of paragraph 2 of Harkins' form subcontract that "Subcontractor shall be bound by all provisions of these documents and also by applicable provisions of the Principal Contract to which Contractor is bound, and to the same extent" is intended, *inter alia*, to assure that subcontractors have no greater rights and remedies against Harkins under the subcontract form than Harkins has against owners or general contractors under principal contracts.

Id. at 44. This, of course, is strong evidence of the contracting parties' intent. Significantly, there was no rebuttal to this evidence.

In addition, the district court also deemed relevant an amendment to the subcontract prepared by Waldinger:

> 3. Paragraph 2, Terms and Conditions of Subcontract is amended as follows:

> Add the following sentence at the end of the paragraph: "Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor which Contractor has against Tishman, the Owner under the Contract Documents."

Id. at 31. The district court believed that this "indicates that Waldinger was well aware that the subcontract's standard form allotted more rights to Harkins, the contractor, than to itself or to any subcontractor. The fact that Waldinger requested and obtained the amendment suggests that it contemplated the types of problems that might arise because all provisions of the primary contract were to be incorporated by reference into the subcontract." *Id.* at 59.

V.

In *Anderson v. City of Bessemer*, ___ U.S. ___ (53 U.S.L.W. 4314, March 19, 1985), the Supreme Court recently explained the highly circumscribed nature of appellate review of findings of fact:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id. at ___ (53 U.S.L.W. at 4317). Accordingly, we do not have the authority to reverse the district court's finding simply because we may have reached another finding as to intent. We are required to examine the entire record -- the contractual provisions as well as

other evidence that was before the district court. Furthermore, our review is no less circumscribed, "even when the district court's findings do not rest on credibility determinations, but are based instead on . . . documentary evidence or inferences from other facts." *Id.*

Section 2 of the Harkins/Waldinger subcontract can be read to limit the scope of the subcontract's arbitration provision to the narrower provisions of the Tishman/Harkins primary contract. The Harkins' affidavit and the amendment proposed by Waldinger further support the district court's finding of what the parties intended. We therefore hold that the district court's interpretation of the contractual language was not clearly erroneous.

VI.

Waldinger challenges the district court's judgment on several other grounds, all of which we find unpersuasive. First, it relies on several cases where courts have held that an incorporation clause in a subcontract does not limit the dispute resolution method specified in the subcontract. Facts in these cases, however, differ from the matter at bar. In *John W. Johnson, Inc. v. Basic Construction Co.*, 429 F.2d 764, 773 (D.C. Cir. 1970), a clause in the primary contract stated that the contractor would bind subcontractors to the terms and provisions of the primary contract which were "applicable to the work." Here the incorporation clause was not limited to work. This factual distinction also applies to *McKinney Drilling Co. v. Collins Co.*, 517 F.Supp. 320, 328 n.7 (N.D. Ala. 1981), *affirmed*, 701 F.2d 132 (11th Cir. 1982), another case upon which appellant relies heavily. Moreover, in *McKinney Drilling Co.*, the court relied upon expert testimony stating that it was industry custom that the terms of the contract at issue

did not apply to the subcontract. *Id.* at 327. Here, the district court relied upon Harkins' affidavit where he stated that the opposite was true. Also, we note that in *Johnson* and *McKinney* the courts of appeals were not limited to the clearly erroneous standard of review, as we are required by *Ram Construction*, but apparently exercised plenary review.

Waldinger also argues that because of the strong federal interest in promoting arbitration, a court should favor a finding of arbitrability.[2] We are uncertain that arbitration is afforded such a stated preference beyond the environment of labor arbitration. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960)("In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here."); *Goodwin v. Elkins & Co.*, 730 F.2d 99, 108 (3d Cir. 1984) ("Arbitrabilty . . . is purely a matter of contract."). *But see Moses H. Cone v. Mercury Construction Co.*, 460 U.S. 1, 25 (1983) ("[D]oubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the

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2. Additionally, Waldinger contends that because Harkins drafted the subcontract, any ambiguity in the contract should be construed against it. *See, e.g., Zulla Steel, Inc. v. O. & M. Gregor, Inc.*, 174 N.J. Super. 124, 415 A.2d 1183 (App. Div. 1980). In that case the court ruled that an ambiguous payment clause in a contract between a contractor and subcontractor should be construed against the contractor because "the contract was on [the contractor's] form and the payment provision was a portion of its printed contract." *Id.* at 1187. However, this is a rule of contract construction, rather than contract interpretation, and as such should not affect the district court's decision on the underlying factual issue of interpretation.

problem at hand is the construction of the contract language itself or an allegation of waiver . . . ."). We do not believe that the rule stated in *Cone* applies here where in interpreting the language of the contracts the district court was performing a fact finding function.

VII.

We will not say that the district court's interpretation of the contract is clearly erroneous. The district court's decision to enjoin the arbitration proceedings was, therefore, not an abuse of its discretion.

The judgment of the district court will be affirmed.

GARTH, J., dissenting:

This case involves a dispute over the reach of an arbitration clause in a construction subcontract in the construction of the Atlantic City Hilton Hotel/Casino ("the Project"). Because I disagree with the majority both as to the applicable standard of review and as to the construction of the subcontract, I dissent.

I.

The majority attempts to characterize the dispute in this case as one of contract *interpretation* rather than contract *construction*. This threshold characterization is a critical one because questions of construction are questions of law subject to plenary review by this court, whereas questions of interpretation are questions of fact, and must be reviewed under a "clearly erroneous" standard. *Ram Construction Co. v. American States Insurance Co.*, 749 F.2d 1049 (3d Cir. 1984). In contrast with the majority, I believe that the dispute in this case is one of contract construction, not contract interpretation.

In *Ram Construction*, we defined "construction" of a contract as the process of determining its legal effect. *Id.* at 1053 (citing 3 Corbin on Contracts § 534). Interpretation, in contrast, is a narrower process of ascertaining the meaning of the particular words used and their applicability to a specific factual situation. The distinction is clearly stated by Williston: "The word 'interpretation' is used with respect to language itself; it is the process of applying the legal standard to expressions found in the agreement in order to determine their meaning. 'Construction,' on the other hand, is used to determine, not the sense of the words or symbols, but the legal meaning of the entire contract; the word is rightly used wherever the import of the writing is made to depend upon a special sense imposed by law." Williston on Contracts § 602, at 320 (3d ed. 1961). *See also* Patterson, *The Interpretation and Construction of Contracts*, 64 Colum. L. Rev. 833, 833-36.

In *Ram Construction*, this court decided that the issue of whether two agreements were or were not part of a single contract was a question of construction, not of interpretation. In this case, as in *Ram Construction*, we are required to construe two contracts: the Principal Contract entered into by Harkins and Tishman, as agent for the owner, Hilton ("the Principal Contract"); and the Subcontract entered into by Harkins and Waldinger ("the Subcontract"). Harkins argues that the Subcontract is governed by the arbitration clause in the Principal Contract, because the Principal Contract is incorporated by reference into the Subcontract. Waldinger, in contrast, argues that the specific arbitration clause of the Subcontract overrides the general provision incorporating the Principal Contract into the Subcontract. This dispute, like that in *Ram Construction*, deals with "the legal meaning of the entire contract," not the meaning of

particular words. It therefore presents a question of construction, as distinct from a question of interpretation, and is subject to plenary review by this court. It is not, in my opinion, a question of fact to be reviewed under the "clearly erroneous" standard as the majority holds.[1]

II.

Even if I were to agree with the majority, which I do not, that this case should be reviewed under the "clearly erroneous" standard, I believe that even that standard would require reversal of the judgment below. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) ("clearly erroneous" standard requires reversal where court is "left with the definite and firm conviction that a mistake has been committed"). Both the principle that a contract should be construed so as to reconcile apparent inconsistencies and give meaning to all its terms, and the principle that specific language in a contract governs over more general language, dictate that the district court erred and that we reverse.

A.

The dispute in this case concerns the question of how to construe the arbitration clause of the Subcontract between Harkins and Waldinger in light of that Subcontract's incorporation of the Principal Contract between Harkins and Tishman. At the outset, it should be noted that the Federal Arbitration Act reflects a strong federal policy favoring arbitration.

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1. The 1985 amendment to Federal Rule of Civil Procedure 52(a), which provides that a lower court's factual findings, "whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous," is not to the contrary, for the amendment refers to questions of interpretation, not to questions of construction.

"The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 (1983); *see also Stateside Machinery Co. v. Alperin*, 591 F.2d 234 (3d Cir. 1979). The Supreme Court, in *Cone*, was referring to the arbitration clause of a *construction* contract. Contrary to the assertion of the majority, therefore, there can be no question that federal policy embodied in the Arbitration Act, as interpreted by the United States Supreme Court, favors the arbitration of commercial as well as labor disputes. However, even absent the dictates of *Cone* and the congressional policies attending the Arbitration Act, basic principles of contract construction mandate reversal here.

The Subcontract between Harkins, the prime contractor, and Waldinger, the subcontractor, was based on a form subcontract provided by Harkins, and modified by three attachments. Paragraph 17 of the form subcontract provides as follows:

> All disputes, claims or questions arising hereunder shall be subject to arbitration and shall be submitted to arbitration in accordance with the provisions then obtaining of the Standard Form Arbitration Procedure of the A.I.A. A determination thereunder shall be final and binding upon the parties thereto. Pending determination, there shall be no work stoppage.

App. 22.

The Subcontract also incorporated the Principal Contract by reference in two places. The front page of the Subcontract provides:

> Enter our order for the following materials, equipment and/or services to be furnished and performed in accordance with the General Conditions, Special Conditions, Plans, Specifications, Drawings, and Addenda, (hereinafter called CONTRACT DOCUMENTS), prepared by John Carl Warnecke & Assocs. & David Jacobson assoc., Arch., all of which form a part of the Contract between JOHN F. HARKINS CO., INC. and Tishman Construction Company, (hereinafter referred to as PRINCIPAL CONTRACT) and hereby becomes a part of this Contract as if set forth at length attached hereto.

App. 21.

The second reference to the Principal Contract is in paragraph 2 of the form Subcontract, which provides:

> Work performed by SUBCONTRACTOR shall be in strict accordance with CONTRACT DOCUMENTS applicable to the work to be performed and materials, articles and/or equipment to be furnished hereunder. *SUBCONTRACTOR shall be bound by all provisions of these documents and also by applicable provisions of the PRINCIPAL CONTRACT to which the CONTRACTOR is bound, and to the same extent.* Where specific work as set forth in the CONTRACT DOCUMENTS is not described in this order, SUBCONTRACTOR shall perform all work normally construed to come within the scope of his activities, as required of the CONTRACTOR under the PRINCIPAL CONTRACT. All work shall be performed to the complete satisfaction of the CONTRACTOR, the Architect and Owner.

App. 22 (emphasis added).

Harkins contends, and the majority agrees, that these incorporating provisions, and particularly the emphasized portion of paragraph 2, override the specific arbitration clause in paragraph 17 of the Subcontract, making the arbitration provisions of the Principal Contract applicable here. The Principal Contract's arbitration provisions, contained in paragraphs 37 and 38 of that Contract, provide for arbitration only in the specific instance of a disagreement over the amount to be paid under a signed written change order, and are therefore not applicable to the disputes which Waldinger seeks to arbitrate here.[2]

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2. Paragraphs 37 and 38 of the Principal Contract provide, in relevant part, as follows:

> "37. In any case in which it is provided by the terms of this contract that any specific dispute or specific payments to be made shall be determined by arbitration, such arbitration shall be conducted in the City in which the Site is located in accordance with Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any Court having jurisdiction thereof.
>
> 38. The Owner, without invalidating this contract, may order extra work or make changes by altering, adding to or deducting from the work, the contract price to be adjusted accordingly. The contractor shall not make any alterations or omit anything, or perform additional or extra work, *except upon written order signed by the Owner*.... No request for payment for extra work will be honored unless accompanied by such written order....
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> *In the case of disagreement as to the amount to be paid or allowed*, the Contractor shall promptly comply with the order and the amount shall be determined by arbitration as herein provided."

App. 10-11 (emphasis added).

B.

It is a general principle of contract law that, where two provisions of a contract are inconsistent, general language must yield to more specific language. *Affiliated Food Distributors, Inc. v. Local Union No. 229*, 483 F.2d 418 (3d Cir. 1973); *see also* Corbin on Contracts, § 547; Restatement 2d Contracts § 203.

The language of paragraph 17 of the Subcontract is clear and unequivocal: "*All* disputes, claims or questions arising hereunder shall be subject to arbitration...." App. 22 (emphasis added). In contrast, the language from paragraph 2 of the Subcontract pointed to by Harkins, which allegedly overrides this clause, is general and vague, merely stating that Waldinger, the subcontractor, is bound by the Principal Contract to the same extent as is Harkins, the prime contractor. Even if this language of the Principal Contract were inconsistent with the Subcontract, the provisions of the latter would control.

This principle of contract law has been applied to situations in the construction industry where a subcontract incorporated a principle contract. Thus, the Fifth Circuit has held that, "while a reference in a subcontract to the provisions, plans and specifications of a general contract imports them into the subcontract where not inconsistent with its terms, it is quite well settled that such a reference is not effective beyond this, and that if the subcontract contains words of definite limitation, they will be given effect and the reference limited accordingly." *Perry v. United States*, 146 F.2d 398, 400 (5th Cir. 1945).

Similarly, the D.C. Circuit has held, relying on the general principles of contract law, that, "even if the prime contract were fully incorporated into the subcontract, its general provisions would not overcome the specific provisions of the subcontract." *John W. Johnson, Inc. v. Basic Construction Co.*, 429 F.2d 764,

772 (D.C. Cir. 1970). The D.C. Circuit rejected the prime contractor's argument that, "because the subcontract fully integrated the terms and conditions of the prime contract [it] operated to bind [the subcontractor] to the same terms, including the Disputes Clause of the prime contract." *Id.*

In a case virtually on all fours with the instant one, the District Court for the Northern District of Alabama construed a clause in a subcontract which provided that "the contractor shall have the same rights and privileges against the subcontractor as the owner has against the contractor." *McKinney Drilling Co. v. Collins Co.*, 517 F. Supp. 320, 325 (N.D. Ala. 1981), *affirmed*, 701 F.2d 132 (11th Cir. 1982). The defendants contended that provisions of the specifications contained in the prime contract controlled over the terms of the subcontract. The court stated,

> [D]efendants' contention ... is legally unsound. Numerous cases have held that a subcontractor is free to contract in any manner that it desires; and if the specific provisions of the subcontract conflict with the plans and specifications, or with the general contract betwen the prime contractor and the owner (all of which are incorporated into the subcontract), the terms of the subcontract prevail.

Id. at 327-28.[3]

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3. The majority's attempt to distinguish *McKinney Drilling* and *Basic Construction* from the instant case does not withstand analysis. Contrary to the assertion of the majority, maj. op. at 15, the language of the subcontract in *McKinney Drilling* is virtually identical to that in the instant case. *McKinney Drilling*, 517 F. Supp. at 320. But more important, the holdings in these cases do not rest upon the precise language of the incorporating clause, but on the principle that a specific clause in the subcontract overrides general language of incorporation.

According to Harkins, the incorporation of the Principal Contract in the instant case was intended to limit the remedies available to the subcontractor, Waldinger, so that Waldinger would not have greater rights as against Harkins than Harkins had as against Hilton. In this manner, Harkins contends, it ensures that it can "pass through" to the owner any claim made against it by the subcontractor. Harkins maintains that the meaning of such a "conduit clause" in restricting the remedies available to the subcontractor is well-known to persons with experience in the construction industry.

The cases cited above dealing with construction industry contracts refute this argument. *See also United States v. Cleveland Electric Co.*, 373 F.2d 585 (4th Cir. 1967); *Central Steel Election Co. v. Will*, 304 F.2d 548 (9th Cir. 1962). They suggest that there is no necessary symmetry between a principal contract and a subcontract. The prime contractor's contract with the subcontractor must be read on its own terms, and there is no reason why these terms may not enlarge the remedies mutually available to the subcontractor and the prime contractor beyond those that are available to the prime contractor in his relationship to the owner. Whatever subjective intent may have been in Harkins' mind at the time it signed the Subcontract,[4] that

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4. The affidavit of Harkins' president, John F. Harkins, which merely recites *Harkins'* interpretation of paragraph 2, is irrelevant to the dispute here. The Subcontract at issue here is clear on its face, and therefore Harkins' intent, to the extent that it contradicts the express language of the contract, should be immaterial and inadmissible under the parol evidence rule. *See, e.g.*, Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1009-10 (3d Cir. 1980).

Harkins' construction of the contract might conceivably carry some weight if this construction were accepted in the industry, or if there were any evidence that Waldinger shared this construction. Restatement 2d, Contracts §§ 201(2), 202(5). The

intent cannot override the explicit language of the Subcontract. The mere insertion of a so-called "conduit clause" cannot operate magically to protect the contractor from meeting his obligations to the subcontractor.

C.

A second principle of contract construction leads to the same result: a contract should be interpreted so as to give meaning to all its terms. Restatement 2d, Contracts § 203(a); *See Schultz v. Onan Corp.*, 681 F.2d 177 (3d Cir. 1982). Under the construction of the subcontract espoused by the majority, the all-disputes arbitration clause of paragraph 17 becomes mere surplusage, for, in the view of the majority, it is overridden by the arbitration clauses of the Principal Contract.

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first possibility, that this is the accepted construction of such a clause in industry circles, is belied by the cases cited above.

Nor is there any evidence that Waldinger knew of Harkins' construction of paragraph 2. The majority, quoting the district court, suggests that Waldinger's proposal to add paragraph 3 of Attachment C to the subcontract indicates that Waldinger was aware that paragraph 2 limited Waldinger's rights to those specified in the principal contract. Maj. op. at 12. Paragraph 3 of Attachment C adds the following to paragraph 2 of the Subcontract: "Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor which Contractor has against Tishman, the Owner under the Contract Documents." App. 31.

This language is obviously designed merely to ensure that Waldinger not be *denied* any remedy that might be available to Harkins under the Principal Contract. It does not even remotely suggest that Waldinger was aware that its remedies vis-a-vis Harkins were *limited* to those available to Harkins vis-a-vis Tishman. In fact, as Waldinger points out, although Attachment C is a paragraph by paragraph amendment of the terms of the Subcontract, it contains no reference to arbitration, nor does it amend the "all-disputes" provision of paragraph 17 in any way.

In my opinion, the incorporating language of paragraph 2 of the Subcontract can be read so as to be consistent with paragraph 17 of the Subcontract, thereby giving full effect to both paragraphs. The majority would read paragraph 2 to mean that Waldinger, the subcontractor, is bound by the Principal Contract *only* to the extent that the prime contractor is bound. It is equally plausible, however, to read this language as meaning that the subcontractor is bound *at least* to the same extent as the prime contractor. If the latter construction is correct, then there is no inconsistency between the arbitration clauses of the Prime Contract and the Subcontract: Paragraph 17 of the Subcontract merely imposes an *additional* requirement to arbitrate on Harkins that, while it goes beyond the arbitration requirement in the Principal Contract, in no way contradicts the Principal Contract.

A second plausible construction of the language of paragraph 2, which also would render it consistent with paragraph 17, would hold that the incorporating language of paragraph 2, which binds the subcontractor "to the same extent" as the prime contractor, refers only to the terms and conditions of the Principal Contract that deal with the scope, character, and manner of performance of the work itself, and not to those that deal with the settlement of disputes. In fact, a number of courts construing similar language have taken this position. *John J. Johnson, Inc. v. Basic Construction Co.*, 429 F.2d 764, 775-776; *United States for Use of B's Co. v. Cleveland Electric Co.*, 373 F.2d 585, 588 (4th Cir. 1967); *McKinney Drilling Co. v. The Collins Co.*, 517 F. Supp. 320, 328 (N.D. Ala. 1981).

However, we need not construe paragraphs 2 and 17 to be consistent with each other. Even if the general incorporating language of paragraph 2 *were*

inconsistent with the specific arbitration provision of paragraph 17, the principle of giving a reasonable and effective meaning to all the terms of the contract would require that the all-disputes arbitration clause of paragraph 17 be given effect. Paragraph 17 must override paragraph 2 because only in this manner can meaning be given to both paragraphs. In contrast, paragraph 2 cannot be construed as the majority does without voiding paragraph 17 of all meaning.[5]

III.

The fact that the Subcontract between Harkins and Waldinger specifically provides for arbitration of all disputes should suffice to dispose of this case, particularly in view of the policy in favor of arbitration and the general rule of contract law that a contract is to be construed most strictly against the drafter (in this case Harkins). Both the principles of contract law and the cases dealing with the construction industry clearly provide that a specific provision of a subcontract is valid, even though it conflicts with a provision of a principal contract which has been incorporated by reference into the subcontract, and even though the provision of the subcontract grants

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5. Harkins would have us believe that paragraph 17 is not surplusage because it grants Harkins the right to initiate arbitration on any issue against Waldinger, even though it grants no reciprocal right to Waldinger. However, there is nothing in either the Principal Contract or the Subcontract to support the view that the Subcontract was intended to give Harkins greater rights than Waldinger to initiate arbitration. The Principal Contract does not give asymmetrical rights to Tishman as against Harkins, and it is hard to see how the same contract could, by virtue of being incorporated into the Subcontract, be construed to give such asymmetrical rights to Harkins as against Waldinger. If arbitration is indeed limited to the subjects described in the Principal Contract, then this limitation applies to all parties, and not just to Waldinger.

different rights and remedies to the subcontractor than those which the prime contractor may have available to it in relation to the project's owner.[6]

For these reasons, I dissent and would reverse the judgment below.

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6. The two cases cited by Harkins, Industrial Indemnity Co. v. Wick Construction Co., 680 P.2d 1100 (Alaska 1984), and Starr Electric Co. v. Basic Construction Co., 586 F. Supp. 964 (M.D. N.C. 1982), are not to the contrary, because in those cases no inconsistency was found between the provisions of the subcontract and the provision of the principal contract that was assertedly applicable to the relationship between the prime contractor and the subcontractor.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CAMDEN, NEW JERSEY, 08101.

JOHN F. HARKINS COMPANY, INCORPORATED,	)	
PLAINTIFF,	)	
VS.	)	CIVIL ACTION NO. 85-2379
THE WALDINGER CORPORATION,	)	
DEFENDANT.	)	

DECISION ON MOTION BY DEFENDANT WALDINGER FOR A STAY OF ACTION PENDING ARBITRATION.

DECISION ON MOTION BY PLAINTIFF HARKINS FOR AN ORDER STAYING A PENDING ARBITRATION INITIATED BY DEFENDANT.

BEFORE: THE HONORABLE STANLEY S. BROTMAN, JUDGE, UNITED STATES DISTRICT COURT, CAMDEN, NEW JERSEY.

DATE: SEPTEMBER 19, 1985

TIME: 9:30 A.M.

* * * * * * * * * * *

REPORTED BY:
STEPHEN J. DANER,
OFFICIAL COURT REPORTER,
P. O. BOX 1029
CAMDEN, NEW JERSEY 08101

(THE FOLLOWING TAKES PLACE IN OPEN COURT)

THE COURT: THIS CONTRACT DISPUTE ARISES IN CONNECTION WITH THE CONSTRUCTION OF THE ATLANTIC CITY HILTON/HOTEL CASINO IN ATLANTIC CITY, NEW JERSEY (THE "PROJECT). PLAINTIFF JOHN F. HARKINS COMPANY, INCORPORATED ("HARKINS") WAS ONE OF SEVERAL PRIMARY CONTRACTORS ON THE PROJECT. UNDER THE TERMS OF ITS CONTRACT WITH HILTON NEW JERSEY CORPORATION ("HILTON"), THE OWNER, AND TISHMAN CONSTRUCTION CORPORATION OF NEW JERSEY ("TISHMAN"), THE PROJECT'S CONSTRUCTION MANAGER, HARKINS AGREED TO INSTALL THE HEATING, VENTILATION AND AIR CONDITIONING SYSTEMS IN THE PROJECT. HARKINS

SUBCONTRACTED THE SHEETMETAL DUCTWORK FOR THAT SYSTEM TO THE DEFENDANT, THE WALDINGER CORPORATION ("WALDINGER").

ON NOVEMBER 9, 1984, WALDINGER INITIATED AN ARBITRATION PROCEEDING AGAINST HARKINS BEFORE THE AMERICAN ARBITRATION ASSOCIATION, ALLEGING THAT CERTAIN ACTS AND OMISSIONS BY HARKINS DURING THE PROJECT'S CONSTRUCTION RESULTED IN DAMAGE TO WALDINGER.

ON MAY 13, 1985, HARKINS INITIATED THIS ACTION IN THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, ATLANTIC COUNTY, SEEKING TO ENJOIN THE PENDING ARBITRATION BETWEEN HARKINS AND WALDINGER AS WELL AS DAMAGES FOR AN ALLEGED BREACH OF CONTRACT.

ON MAY 17, 1985, WALDINGER REMOVED THE STATE ACTION TO FEDERAL COURT.

JURISDICTION IS FOUNDED ON DEVERSITY (SIC) OF CITIZENSHIP, 28 UNITED STATES CODE SECTION 1332. HARKINS IS A PENNSYLVANIA CORPORATION WITH ITS PRINCIPAL PLACE OF BUSINESS IN PENNSYLVANIA. WALDINGER IS AN IOWA CORPORATION AND HAS ITS PRINCIPAL PLACE OF BUSINESS IN THAT STATE.

PRESENTING BEFORE THE COURT ARE MOTIONS BY BOTH PARTIES RELATING TO THE PENDING ARBITRATION. DEFENDANT WALDINGER SEEKS TO STAY THIS COURT ACTION PENDING THE RESOLUTION OF ARBITRATION PROCEEDINGS. PLAINTIFF HARKINS MOVES TO ENJOIN WALDINGER FROM PROCEEDING WITH THE PENDING ARBITRATION PENDING DETERMINATION OF THIS ACTION. FOR THE REASONS DISCUSSED BELOW, THE COURT WILL DENY WALDINGER'S MOTION AND

GRANT HARKINS' MOTION TO ENJOIN THE PENDING ARBITRATION.

THE THE CONTRACT

IT IS UNDISPUTED THAT THE LANGUAGE OF TWO CLAUSES OF THE CONTRACT BETWEEN HARKINS AND WALDINGER (THE "SUBCONTRACT") AND TWO CLAUSES OF THE CONTRACT BETWEEN HARKINS AND HILTON AND TISHMAN (THE "PRIMARY CONTRACT") IS PIVOTAL TO A RESOLUTION OF THIS DISPUTE.

SECTION 17 OF THE SUBCONTRACT PROVIDES:

> 17. ALL DISPUTES, CLAIMS OR QUESTIONS ARISING HEREUNDER SHALL BE SUBJECT TO ARBITRATION AND SHALL BE SUBMITTED TO ARBITRATION IN ACCORDANCE WITH THE

PROVISIONS, THEN OBTAINING, OF THE STANDARD FORM OF ARBITRATION PROCEDURE OF THE A.I.A. A DETERMINATION THEREUNDER SHALL BE FINAL AND BINDING UPON THE PARTIES THERETO. PENDING DETERMINATION, THERE SHALL BE NO WORK STOPPAGE.

SECTION 2 OF THE SUBCONTRACT PROVIDES:

2. WORK PERFORMED BY SUBCONTRACTOR SHALL BE IN STRICT ACCORDANCE WITH CONTRACT DOCUMENTS APPLICABLE TO WORK TO BE PERFORMED AND MATERIALS, ARTICLES AND/OR EQUIPMENT TO BE FURNISHED HEREUNDER. SUBCONTRACTOR

SHALL BE BOUND BY ALL PROVISIONS OF THESE DOCUMENTS AND LSO BY APPLICABLE PROVISIONS OF THE PRINCIPAL CONTRACT TO WHICH THE CONTRACTOR IS BOUND, AND TO THE SAME EXTENT. WHERE SPECIFIC WORK AS SET FORTH IN THE CONTRACT DOCUMENTS IS NOT DESCRIBED IN IN THIS ORDER, SUBCONTRACTOR SHALL PERFORM ALL WORK NORMALLY CONSTRUED TO COME WITHIN THE SCOPE OF HIS ACTIVITIES, AS REQUIRED OF THE CONTRACTOR UNDER THE PRINCIPAL CONTRACT. ALL WORK SHALL BE PERFORMED TO THE COMPLETE SATISFACTION OF THE

CONTRACTOR, THE ARCHITECT AND OWNER. (EMPHASIS ADDED.)

HARKINS AND WALDINGER AMENDED SECTION 2 OF THE STANDARD FORM SUBCONTRACT BY ADDING THE FOLLOWING SENTENCE AT THE END OF THE PARAGRAPH QUOTED SUPRA: "SUBCONTRACTOR SHALL HAVE THE BENEFIT OF ALL RIGHTS, REMEDIES AND REDRESS AGAINST THE CONTRACTOR WHICH CONTRACTOR HAS AGAINST TISHMAN, THE OWNER UNDER THE CONTRACT DOCUMENTS." ATTACHMENT "C" TO THE SUBCONTRACT, EXHIBIT B TO THE COMPLAINT.

IT IS UNDISPUTED THAT ALL PROVISIONS OF THE PRIMARY CONTRACT ARE INCORPORATED BY REFERENCE INTO THE SUBCONTRACT PURSUANT TO SECTION 2 OF THE SUBCONTRACT.

SECTION 37 OF THE PRIMARY CONTRACT, WHICH IS ATTACHED TO THE COMPLAINT AS EXHIBIT A, REFERS TO ARBITRATION IN GENERAL.

37. IN ANY CASE IN WHICH IT IS PROVIDED BY THE TERMS OF THIS CONTRACT THAT ANY SPECIFIC DISPUTE OR SPECIFIC PAYMENT TO BE MADE SHALL BE DETERMINED BY ARBITRATION, SUCH ARBITRATION SHALL BE CONDUCTED IN THE CITY IN WHICH THE SITE IS LOCATED IN ACCORDANCE WITH THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION, AND JUDGMENT UPON THE AWARD RENDERED BY THE ARBITRATORS MAY BE ENTERED IN ANY COURT HAVING JURISDICTION THEREOF, (EMPHASIS ADDED.)

SECTION 38 OF THE PRIMARY CONTRACT REFERS TO "CHANGES AND EXTRAS" AND IS

APPARENTLY THE ONLY CLAUSE OF THE PRIMARY CONTRACT THAT REFERS SPECIFICALLY TO ARBITRATION. IN PERTINENT PART, IT PROVIDES:

> 38. THE OWNER, WITHOUT INVALIDATING THIS CONTRACT, MAY ORDER EXTRA WORK OR MAKE CHANGES BY ALTERING, ADDING TO OR DEDUCTING FROM THE WORK, THE CONTRACT PRICE TO BE ADJUSTED ACCORDINGLY. THE CONTRACTOR SHALL NOT MAKE ANY ALTERATIONS OR OMIT ANYTHING, OR PERFORM ADDITIONAL OR EXTRA WORK, EXCEPT UPON WRITTEN ORDER SIGNED BY THE OWNER. . . .
>
> * * *

> IN CASE OF DISAGREEMENT AS TO THE AMOUNT TO BE PAID OR ALLOWED, THE CONTRACTOR SHALL PROMPTLY COMPLY WITH THE ORDER AND THE AMOUNT SHALL BE DETERMINED BY ARBITRATION AS HEREIN PROVIDED.

THE ESSENCE OF WALDINGER'S ARGUMENT IS THAT SECTION 17 OF THE SUBCONTRACT ON ITS FACE PROVIDES FOR ARBITRATION OF ANY AND ALL DISPUTES THAT MIGHT ARISE IN CONNECTION WITH THAT AGREEMENT. HARKINS, ON THE OTHER HAND, CONTENDS THAT THE LANGUAGE OF SECTION 17 OF THE SUBCONTRACT IS LIMITED BY SECTIONS 37 AND 38 OF THE PRIMARY CONTRACT, WHICH RESERVE ARBITRATION AS AN OPTION ONLY IN DISPUTES OVER SIGNED WRITTEN CHANGED

ORDERS. AT THE OUTSET, THE COURT NOTES THAT WALDINGER'S DEMAND FOR ARBITRATION CLAIMED, INTER ALIA, THAT HARKINS "REFUSED TO ISSUE APPROPRIATE CHANGE ORDERS." WALDINGER'S DEMAND FOR ARBITRATION, ATTACHED AS EXHIBIT C TO THE COMPLAINT, SETS OUT THE NATURE OF ITS DEMAND AS FOLLOWS:

> RESPONDENT [HARKINS] CHANGED THE CONDITIONS, SEQUENCE AND SCHEDULE UNDER WHICH CLAIMANT'S [WALDINGER] WORK WAS TO BE PERFORMED, ORDERED CHANGES IN THE WORK, FAILED TO MAKE TIMELY PROGRESS PAYMENTS, FAILED OR REFUSED TO REDUCE RETAINAGE OR REQUIRED BY THE CONTRACT, OTHERWISE INTERFERED ACTIVELY

WITH THE PERFORMANCE OF THE WORK, IMPOSED UNREASONABLE SCHEDULE REQUIREMENTS ON THE WORK, REFUSED TO GRANT PROPER TIME EXTENSIONS, AND REFUSED TO ISSUE APPROPRIATE CHANGE ORDERS, ALL CAUSING CLAIMANT TO PROVIDE ADDITIONAL LABOR AND MATERIAL FOR WHICH RESPONDENT HAS FAILED TO PAY.

ARBITRABILITY OF DISPUTES

THE FEDERAL ARBITRATION ACT, 9 UNITED STATES CODE PARAGRAPHS 1 ET SEQ. (THE "ACT"), ON WHICH WALDINGER BASES ITS MOTION TO STAY THIS ACTION PENDING ARBITRATION, REFLECTS A STRONG FEDERAL POLICY FAVORING ARBITRATION. MOSES H. CONE HOSPITAL V. MERCURY CONSTRUCTION COMPANY, 460 UNITED STATES 1 (1983)

(DOUBTS CONCERNING THE, 24 SCOPE OF ARBITRABLE ISSUES SHOULD BE RESOLVED IN FAVOR OF ARBITRATION); SEE ALSO UNITED STEEL WORKERS V. WARRIOR & GULF NAVIGATION COMPANY, 363 UNITED STATES 574 (1960). IN SINGER COMPANY V. TAPPAN COMPANY, 403 F. SUPP. 322, (D.N.J. 1975) (LACEY, J.), THE COURT SAID:

> WHAT EMERGES THEN IS THIS PRINCIPLE, WHEN INTERPRETING THE SCOPE OF AN ARBITRATION CLAUSE, THAT IS, IN ENDEAVORING TO DETERMINE WHAT THE PARTIES INTENDED WOULD BE ARBITRABLE, FEDERAL COURTS ARE NOT TO APPLY THE TRADITIONAL RULES OF CONTRACT CONSTRUCTION BUT RATHER A

> FEDERAL RULE THAT SEEMINGLY REQUIRES A CLEARLY EXPRESSED INTENT NOT TO ARBITRATE AN ISSUE BEFORE SUCH AN ISSUE CAN BE RULED ONE FOR JUDICIAL DETERMINATION; AND FURTHER, THAT IF THE ISSUE IS A DOUBTFUL ONE, THE DOUBT IS TO BE RESOLVED IN FAVOR OF ARBITRATION.

403 F. SUPP. AT 329 (EMPHASIS IN ORIGINAL). SEE ALSO STATESIDE MACHINERY COMPANY V. ALPERIN, 591 F.2D 234, 240 (3D CIR. 19/9) (DOUBTFUL ISSUES REGARDING THE APPLICABILITY OF AN ARBITRATION CLAUSE ARE TO BE DECIDED IN FAVOR OF ARBITRATION).

IMPLICIT IN THIS POLICY IS THAT QUESTIONS OF ARBITRABILITY ARE FOR THE

COURTS TO DECIDE. INTERNATIONAL BROTHERHOOD OF TEAMSTERS V. WESTERN PENNSYLVANIA MOTOR CAR CARRIERS ASSOCIATION, 574 F.2D 783 (3D CIR. 1978); SINGER V. TAPPAN, SUPRA, 403 F. SUPP. AT 329. HOWEVER, THE COURT'S DECISION MUST BE BASED ON THE AGREEMENT BETWEEN THE PARTIES AS TO ARBITRATION IN THE FIRST INSTANCE. IN OTHER WORDS, "[A]RBITRABILITY IS PURELY A MATTER OF CONTRACT," GOODWIN V. ELKINS & COMPANY, 730 F.2D 99, 108 (3D CIR. 1984). IN SUM, THE COURT, MUST EXAMINE CLOSELY THE LANGUAGE AND INTENT OF THE CONTRACT BETWEEN THE PARTIES AND DETERMINE WHETHER ANY ARBITRATION CLAUSE WAS INTENDED TO COVER THE DISPUTE AT ISSUE, RESOLVING DOUBTS IN FAVOR OF ARBITRATION.

THE DISPUTED ARBITRATION PROVISION

HARKINS URGES THE COURT TO ADOPT ITS NARROW INTERPRETATION OF THE PROVISIONS OF THE SUBCONTRACT AND THE PRIMARY CONTRACT VIS-A-VIS ARBITRATION. ESSENTIALLY, IT ARGUES THAT DESPITE THE EXPANSIVE LANGUAGE OF SECTION 17 OF THE SUBCONTRACT ("ALL DISPUTES . . . SHALL BE SUBJECT TO ARBITRATION. . . ."), ONLY DISPUTES RELATING TO SIGNED CHANGE ORDERS ARE ARBITRABLE BECAUSE OF THE SPECIFIC LANGUAGE OF SECTIONS 37 AND 38 OF THE PRIMARY CONTRACT AND THE INCORPORATION BY REFERENCE OF ALL PROVISIONS OF THE PRIMARY CONTRACT INTO THE SUBCONTRACT VIA SECTION 2 OF THE SUBCONTRACT. HARKINS CONTENDS THAT BECAUSE SECTION 2 OF THE SUBCONTRACT BINDS WALDINGER TO ALL "APPLICABLE

PROVISIONS OF THE [PRIMARY CONTRACT] TO WHICH [HARKINS] IS BOUND, AND TO THE SAME EXTENDT," (SIC) WALDINGER CANNOT INITIATE ARBITRATION PROCEEDINGS IN CONNECTION WITH ANYTHING THAT HARKINS ITSELF COULD NOT ARBITRATE UNDER THE PRIMARY CONTRACT. BECAUSE THE PRIMARY CONTRACT LIMITS THE SUBJECT MATTER OF POTENTIAL ARBITRATION TO SIGNED, WRITTEN CHANGE ORDERS, HARKINS ARGUES THAT WALDINGER'S FAR-REACHING DEMAND FOR ARBITRATION PRESENTS ISSUES THAT ARE NOT ARBITRABLE WITHIN THE TERMS OF THE SUBCONTRACT AND THE PRIMARY CONTRACT.

WALDINGER TAKES A BROADER VIEW OF THE SCOPE OF THE ARBITRATION PROVISIONS. IT FOCUSES ON SECTION 17 OF THE SUBCONTRACT AND CONTENDS THAT

IF, CONTRARY TO ITS TERMS, "ALL DISPUTES" ARE NOT SUBJECT TO ARBITRATION, THE SECTION ITSELF IS DEVOID OF SIGNIFICANCE. IT FURTHER ARGUES THAT ALTHOUGH SECTION 38 OF THE PRIMARY CONTRACT MANDATES ARBITRATION OF DISPUTES OVER SIGNED CHANGE ORDERS, SECTION 37 SETS OUT A PROCEDURE FOR ARBITRATION IN ANY CASE WHICH THE PRIMARY CONTRACT SPECIFICALLY INDICATES ARBITRATION WILL BE REQUIRED. THEREFORE, WALDINGER CONTENDS, ARBIRRATION OF OTHER DISPUTES WAS CONEMPLATED BY THE PRIMARY CONTRACT AND ITS PENDING DEMAND FOR ARBITRATION IS ARBITRABLE.

WALDINGER IS CORRECT IN ASSERTING THAT SECTION 37 OF THE PRIMARY CONTRACT PROVIDES FOR ARBITRATION IN THE EVENT

THAT ANOTHER CLAUSE OF THE CONTRACT SPECIFICALLY SO PROVIDES. HOWEVER, THE ONLY SECTION OF THE PRIMARY CONTRACT THAT ACTUALLY DOES REFER TO ARBITRABLE DISPUTES IS SECTION 38, WHICH COVERS CHANGES AND EXTRAS. THEREFORE, WALDINGER'S ARGUMENT THAT SECTION 17 OF THE SUBCONTRACT CAN BE READ EXPANSIVELY IN LIGHT OF THE PROCEDURAL AUTHORIZATIONS OF SECTION 37 OF THE PRIMARY CONTRACT IS WITHOUT MERIT. THE ONLY REAL ISSUE FOR THE COURT TO RESOLVE IS WHETHER WALDINGER CAN SUBMIT ISSUES FOR ARBITRATION UNDER THE SUBCONTRACT WHEN HARKINS COULD NOT SEEK ARBITRATION OF THE SAME ISSUES UNDER THE PRIMARY CONTRACT, GIVEN THE FACT THAT SECTION 2 OF THE SUBCONTRACT BINDS WALDINGER, THE SUBCONTRACTOR, TO THE

SAME EXTENT TO WHICH HARKINS IS BOUND UNDER THE PRIMARY CONTRACT. WE BELIEVE THAT THE CORRECT INTERPRETATION BARS WALDINGER FROM ARBITRATING DISPUTES UNDER THE SUBCONTRACT IF HARKINS COULD NOT DO THE SAME UNDER THE PRIMARY CONTRACT.

THE SUBCONTRACT CONSISTS OF HARKINS' FORM SUBCONTRACT, AS AMENDED BY THE PARTIES. AS A CONTRACTOR, HARKINS ENTERS INTO PRINCIPAL CONTRACTS ON VARYING PROJECTS WHOSE TERMS INEVITABLY DIFFER. THEREFORE, ITS FORM SUBCONTRACT INCLUDES SECTION 2, WHICH IS INTENDED INTER ALIA "TO ASSURE THAT SUBCONTRACTORS HAVE NO GREATER RIGHTS AND REMEDIES AGAINST HARKINS UNDER THE SUBCONTRACT FORM THAN HARKINS HAS AGAINST OWNERS OR GENERAL CONTRACTORS

UNDER PRINCIPAL CONTRACTS." AFFIDAVIT OF JOHN F. HARKINS. AS HARKINS NOTES IN ITS REPLY BRIEF, THE PURPOSE OF SUCH A PROVISION IS TO PROTECT ITSELF FROM THE POSSIBILITY OF HAVING TO LITIGATE A "PASS THROUGH" OF A SUBCONTRACTOR'S CLAIM IN A FORUM DIFFERENT FROM THE ONE IN WHICH THE SUBCONTRACTOR'S CLAIM IS ASSERTED, WITH THE ATTENDANT RISK OF INCONSISTENT VERDICTS AND GREATER COSTS. (A "PASS THROUGH" IS APPARENTLY INDUSTRY JARGON FOR THE CONTRACTOR'S RIGHT OVER AGAINST THE GENERAL CONTRACTOR OR OWNER IN CONNECTION WITH MERITORIOUS CLAIMS ASSERTED BY THE SUBCONTRACTOR AGAINST THE CONTRACTOR ITSELF.) REPLY BRIEF OF HARKINS AT 2.

WALDINGER DOES NOT ALLEGE THAT IT LACKS KNOWLEDGE OR EXPERIENCE IN

NEGOTIATING CONSTRUCTION CONTRACTS. THE COURT MUST ASSUME, THEREFORE, THAT BOTH HARKINS AND WALDINGER APPROACHED THE SIGNING OF THE SUBCONTRACT AS SELF-INTERESTED COMMERCIAL ENTITIES FAMILIAR WITH THE STANDARDS AND PRACTICES OF THE INDUSTRY. INDEED, THE MODIFICATION TO SECTION 2 OF THE SUBCONTRACT THAT PROVIDED WALDINGER WITH "THE BENEFIT OF ALL RIGHTS, REMEDIES AND REDRESS AGAINST THE CONTRACTOR WHICH THE CONTRACTOR HAS AGAINST. . . THE OWNER" INDICATES THAT WALDINGER WAS WELL AWARE THAT THE SUBCONTRACT'S STANDARD FORM ALLOTTED MORE RIGHTS TO HARKINS, THE CONTRACTOR, THAN TO ITSELF OR TO ANY SUBCONTRACTOR. THE FACT THAT WALDINGER REQUESTED AND OBTAINED THE AMENDMENT SUGGESTS THAT IT

CONTEMPLATED THE TYPES OF PROBLEMS THAT MIGHT ARISE BECAUSE ALL PROVISIONS OF THE PRIMARY CONTRACT WERE TO BE INCORPORATED BY REFERENCE INTO THE SUBCONTRACT.

AS HARKINS POINTS OUT IN ITS REPLY BRIEF, THE ALLENCOMPASSING LANGUAGE OF SECTION 17 OF THE SUBCONTRACT IS NOT "RENDERED NUGATORY," AS WALDINGER CLAIMS, BY THE LIMITING PROVISIONS OF THE PRIMARY CONTRACT VIS-A-VIS ARBITRATION. WHILE WALDINGER IS BARRED FROM SUBMITTING TO ARBITRATION ANY DISPUTES NOT RELATED TO SIGNED CHANGE ORDERS, JUST AS HARKINS IS SIMILARLY BARRED WITH RESPECT TO HILTON AND TISHMAN, HARKINS ITSELF CAN SUBMIT OTHER DISPUTES TO ARBITRATION SINCE THE PRIMARY CONTRACT PLACES NO RESTRICTIONS

ON HILTON AND TISHMAN'S ABILITY TO INITIATE ARBITRATION.

THE COURT FINDS THAT THE PROPER INTERPRETATION OF THE DISPUTED CONTRATCUAL PROVISIONS LIMITS ARBITRABILITY TO DISPUTES OVER SIGNED CHANGE ORDERS, AS SPECIFIED IN SECTION 38 OF THE PRIMARY CONTRACT. BECAUSE WALDINGER'S DEMAND FOR ARBITRATION ADDRESSES A BROADER ARRAY OF ISSUES, THE COURT WILL DENY WALDINGER'S MOTION FOR A STAY PENDING ARBITRATION AND WILL GRANT HARKINS' MOTION TO STAY THE PENDING ARBITRATION. AN APPROPRIATE ORDER WILL BE ENTERED.

IT IS ORDERED THAT: (1) DEFENDANT THE WALDINGER CORPORATION'S MOTION TO STAY THE ACTION PENDING ARBITRATION IS HEREBY DENIED. (2) PLAINTIFF JOHN F.

HARKINS COMPANY, INCORPORATED'S MOTION FOR AN ORDER STAYING A PENDING ARBITRATION INITIATED BY DEFENDANT BEFORE THE AMERICAN ARBITRATION ASSOCIATION ON NOVEMBER 9, 1984 IS HEREBY GRANTED (3) NO COSTS.

(AT WHICH TIME THE MATTER WAS CONCLUDED)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 85-2379

JOHN F. HARKINS CO.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
THE WALDINGER CORP.,	:	
	:	
Defendent.	:	ORDER

This matter having come before the court on the 19th day of September, 1985; and

The court having considered the submissions and arguments of the parties; and

For the reasons stated in the court's opinion entered on the record that date (Stephen J. Daner, Official Court Reporter),

It is on this 30th day of September, 1985, hereby ORDERED that:

1. defendant The Waldinger Corp.'s motion to stay the action pending arbitration is DENIED; and
2. plaintiff John F. Harkins Co., Inc.'s motion for an order staying a pending arbitration initiated by defendant before the American Arbitration Association on November 9, 1984 is GRANTED.

No costs.

/s/

Stanley S. Brotman U.S.D.J.

ENTERED
on the
docket
Oct 2, 1985
By: /s/
(Deputy Clerk)

Original
FILED

SEP 30 1985

At 8:30 _____ M
ALLYN Z. LITE
Clerk

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

July 14, 1986 Direct Dial 597-3136

TO: Gary J. Lesneski, Esq.
James Stephenson, Esq.
Carl H. Hanzelik, Esq. *
Patrick T. McGhan, Jr., Esq.

NOTICE OF JUDGMENT

This Court's opinion was filed and Judgment was entered today in Case No. 85-5695 and copies are enclosed herewith.
[FRAP 39, 40 and 41 reprinted]

Sally Mrvos, Clerk

*See attached bill of costs form.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5695

JOHN F. HARKINS COMPANY, INC.

v.

THE WALDINGER CORPORATION

Appellant

(D.N.J. Civil No. 85-2379)

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, and
SEITZ, ADAMS, GIBBONS, WEIS,
HIGGINBOTHAM, SLOVITER, BECKER,
STAPLETON, MANSMANN, and GARTH,
Circuit Judges

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision havintg asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/
Chief Judge

DATED: AUG 20 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5695

John F. Harkins Company, Inc.,

v.

The Waldinger Corporation, Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgement in lieu of formal mandate in the above cause be, and it is hereby stayed until October 26, 1986.

/s/
Chief Judge

Dated: Sep 3 - 1986

Supreme Court, U.S.
FILED
DEC 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

No. 86-646

TWC HOLDINGS, INC.,

Petitioner,

v.

JOHN F. HARKINS CO., INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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30 pp

QUESTION PRESENTED

In a case where the parties to a construction subcontract disagreed over the interpretation of a provision binding the subcontractor to the provisions of the contractor's principal contract with the owner "to the same extent" that the contractor is bound, was the District Court's finding, on the basis of the evidence submitted, that the parties intended by that provision for the terms of the principal contract to limit the subcontractor's rights and remedies against the contractor under the subcontract, including rights of arbitration, subject to appellate review under the clearly erroneous rule?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioner, TWC Holdings, Inc., then known as The Waldinger Corporation, Inc., and the respondent John F. Harkins Company, Inc.

Respondent John F. Harkins Company, Inc. has no parent company, subsidiaries or affiliates to list pursuant to Rule 28.1.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 28.1 LIST	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
1. THIS CASE INVOLVES NO ISSUES WHICH ARE OF NATIONAL SIGNIFICANCE OR ARE LIKELY TO AFFECT OTHERS, AND THE OPINION BELOW IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS	4
2. SUPREME COURT REVIEW WOULD NOT BE APPROPRIATE BECAUSE THE RECORD UPON WHICH THE PETITION IS PREDICATED IS MISLEADING, INCOMPLETE AND DOES NOT PROVIDE A SOUND FOUNDATION FOR A DECISION	5
3. THE PETITION'S PRINCIPAL CLAIM THAT THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *CONE* IS ERRONEOUS	8
(a) The Language Relied Upon From *Cone* Is *Dictum*	9
(b) In Any Event, The Third Circuit's Decision Is Not In Conflict With The Cited Language Of *Cone*	10
4. THE STANDARD OF REVIEW EMPLOYED BY THE THIRD CIRCUIT IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OTHER COURTS	13
(a) Waldinger Mischaracterizes The Standard Of Review Applied By The Third Circuit	13
(b) There Is No Conflict Between The Decision Of The Third Circuit And Decisions Of This Court Or Other Circuits As To The Applicable Standard Of Review	15
(c) In This Case, The Standard Of Review Was Not Material To The Third Circuit's Decision	19

Page

5. THE THIRD CIRCUIT'S DECISION IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS CONCERNING CONTRACT PROVISIONS INCORPORATED BY REFERENCE... 20

CONCLUSION 22

TABLE OF AUTHORITIES

	Page
CASES	
Anderson v. City of Bessemer, 470 U.S. 564 (1985)	19
Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985)	9,13
Explo, Inc. v. Southern Natural Gas Co., 788 F.2d 1096 (5th Cir. 1986)	18
Matter of Barclay Industries, Inc., 736 F.2d 75 (3rd Cir. 1984)	19
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S.Ct. 3346 (1985)	9,15-18
Moses H. Cone Memorial Hospital v. Mercury Construction Co., 460 U.S. 1 (1983)	8-12,15, 16
Perry v. United States, 146 F.2d 398 (5th Cir. 1945)	21
Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984)	10
Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960)	10
Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)	10
Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)	10,13,20
The Waldinger Corporation v. Reliance United Pacific Insurance Co., D.Ct.N.J., C.A. No. 86-1721	6
STATUTES	
9 U.S.C. § 3	5,7
OTHER AUTHORITIES	
Fed. R. Civ. P. 52(a)	15
Restatement (Second) Contracts §§ 220, 222	20

IN THE

Supreme Court of the United States

October Term, 1986

No. 86-646

TWC HOLDINGS, INC.,

Petitioner,

v.

JOHN F. HARKINS CO., INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF THE CASE

The instant Petition asks this Court to issue a writ of *certiorari* to review the determination by the courts below that under the particular agreement and facts presented, a contractor in the construction industry protected itself from the risk, exposure and cost of inconsistent or conflicting rights and remedies in its principal contractual relationship with the owner, on the one hand, and its separate subcontractual relationship with subcontractors, on the other hand, by limiting its subcontractors' arbitration and other rights by the terms of its principal contract with the owner.

Respondent John F. Harkins Co., Inc. ("Harkins") is a mechanical contractor and, as such, enters into principal contracts with owners for the installation of heating, ventilating, air conditioning and/or plumbing systems on numerous construc-

tion projects. After being awarded a contract, Harkins frequently subcontracts parts of the work, and utilizes its own form subcontact for that purpose.

The principal contracts that Harkins enters into with owners inevitably contain differing rights, duties and remedies. Using the issue of arbitration involved in this case as one of numerous possible examples, certain principal contracts may provide that any dispute which the parties cannot resolve must be arbitrated; other principal contracts may provide for arbitration rights regardless of the nature of the dispute; while others may provide for arbitration only for certain types of disputes.

Given the impossibility of foreseeing and specifically providing in advance for the infinite variety of terms and conditions that different principal contracts may impose, and to protect against finding itself on any particular project in the untenable situation of having inconsistent or conflicting rights, duties and remedies under its principal contract and subcontracts, Harkins' form subcontract sets out in general terms its legal relationship with its subcontractors, but expressly stipulates that to the extent the rights or remedies of subcontractors set forth in the subcontract differ from those of Harkins against an owner under a principal contract, the subcontractor is to be bound by the terms of the principal contract. This critical protective proviso is set forth in Paragraph 2 of this subcontract form:

> *SUBCONTRACTOR shall be bound by* all provisions of these documents and also by applicable *provisions of the PRINCIPAL CONTRACT* to which CONTRACTOR is bound, *and to the same extent.* [(A8) [1] (italics added).]

Such protection is particularly important with respect to remedies because in the construction industry, the scheduling and work of contractors and their subcontractors is subject to the control of the owner, resulting in the contractor usually having a "pass through", or right over, against the owner for

[1] References are to the Appendix to the Petition.

claims which the contractor's subcontractors assert against it. Thus, a contractor who might be generally agreeable to arbitration with its subcontractors, but who wants to avoid the possibility of being required to litigate in court against the owner the "pass through" of a subcontractor's claim which is subject to arbitration, must make sure its subcontractors have no greater arbitration rights against it than it has against the owner.

Here, Harkins was one of several prime contractors on a construction project under a contract with the Owner to install heating, ventilation and air conditioning systems ("the Principal Contract"). Harkins awarded Petitioner TWC Holdings, Inc., then known as The Waldinger Corporation ("Waldinger"), a subcontract, using Harkins' standard subcontract form, for the sheetmetal ductwork for those systems ("the Subcontract"). Prior to execution of the Subcontract, Waldinger proposed many additions and changes to Harkins form subcontract. One of Waldinger's proposed amendments to which Harkins agreed was the addition to critical Paragraph 2 of the following language: "Subcontractor shall have the benefit of all rights, remedies and redress against the Contractor which Contractor has against . . . the Owner under the Contract Documents." (A10-A11). Waldinger's Petition inexcusably fails to even make reference to the fact of this amendment, which was one of the bases of the District Court's finding.

Prior to the completion of the project, Waldinger initiated an arbitration proceeding against Harkins for damages. As jurisdictional grounds for the arbitration, Waldinger cited an arbitration provision in Paragraph 17, while ignoring Paragraph 2, of the Subcontract. Harkins then commenced the present action seeking (a) damages of its own, (b) a declaratory judgment that, because Harkins could not arbitrate against the Owner under the Principal Contract the "pass through" of Waldinger's claims, those claims were not arbitrable under the terms of the Subcontract, and (c) injunction of the arbitration.

Both parties then filed motions and affidavits with respect to the arbitration which Waldinger had initiated, Harkins seeking to enjoin the arbitration and Waldinger seeking to stay this action while the arbitration proceeded.

After a hearing, the District Court entered a Decision (A27) finding as a fact that, at the time the Subcontract was entered, Waldinger and Harkins mutually understood and intended that by virtue of Paragraph 2, the provisions of the Principal Contract were a limitation upon Waldinger's rights and remedies against Harkins, and, with respect to arbitration, "the correct interpretation bars Waldinger from arbitrating disputes under the Subcontract if Harkins could not do the same under the Primary Contract." (A48-A51). The District Court therefore entered an Order granting Harkins' motion to enjoin the arbitration and denying Waldinger's motion to stay the action below. (A54). No injunction *per se* was ever entered.

On appeal, the Third Circuit affirmed, concluding that under the facts of this case, the District Court's finding that the parties intended by their Subcontract that Waldinger could only arbitrate disputes against Harkins "to the same extent" that Harkins could arbitrate those disputes against the Owner under the Principal Contract was not clearly erroneous, and that the District Court committed no error in reaching its legal conclusion that the parties' disputes did not come within the scope of that arbitration agreement.[2] Although it contested the point below, Waldinger now concedes that the legal conclusion that the parties' claims would not be arbitrable under the terms of the Principal Contract was correct. (Petition, 4).

REASONS FOR DENYING THE WRIT

1. THIS CASE INVOLVES NO ISSUES WHICH ARE OF NATIONAL SIGNIFICANCE OR ARE LIKELY TO AFFECT OTHERS, AND THE OPINION BELOW IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS

Waldinger's portrayal of the Third Circuit's Opinion as involving issues of great national importance that will affect significant numbers of other persons or businesses, and as being

[2] The reported Opinion of the Third Circuit, 796 F.2d 657, contains a correction to the slip Opinion in the Appendix attached to the Petition, *viz.*, the word "Waldinger" in the first line of the last paragraph on page A3 of the Appendix is corrected to "Harkins".

in conflict with decisions of this Court and other Circuits, is based on an inaccurate and incomplete statement of the case, a misreading or misdescription of the decisions which it relies upon, and generous dosages of hyperbole.

The Opinion below involved only review of District Court findings, based on the facts presented, as to what private parties meant by particular language in their individual Subcontract. The Subcontract language interpreted by the District Court seemingly is unique, at least to the extent that neither party adduced any evidence that the principal provision in question here (Paragraph 2) commonly appears in construction contracts or other types of contracts, nor was able to cite any other case involving that provision. Once the District Court determined the factual issue of what the parties understood and intended that provision of the Subcontract to mean, the legal issue of whether the parties' disputes were within the scope of the parties' arbitration agreement followed easily, and is not contested by Waldinger.

Moreover, contrary to Waldinger's contentions, the decisions of this Court and other Circuits cited not only are not in conflict with the Opinion of the Third Circuit below, but do not even address the issue that was presented here. This point is discussed in more detail at pp. 8-21, *infra*.

2. SUPREME COURT REVIEW WOULD NOT BE APPROPRIATE BECAUSE THE RECORD UPON WHICH THE PETITION IS PREDICATED IS MISLEADING, INCOMPLETE AND DOES NOT PROVIDE A SOUND FOUNDATION FOR A DECISION

Under Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, a federal court action may be stayed in favor of arbitration only if the action involves an issue "referable to arbitration under an agreement in writing". The only written agreement providing for arbitration of its disputes with Harkins which Waldinger has ever claimed exists is the Subcontract.

Unfortunately, however, Waldinger has not been entirely candid in these proceedings, for at the very time it relies in this action and in this Court upon the Subcontract as a written

agreement providing for arbitration, it is, without disclosing the fact here, taking the position in a separate federal court action that the Subcontract between it and Harkins is not binding or enforceable.

On May 2, 1986, nearly a year after this action was commenced by Harkins, and just one month before oral argument in the Third Circuit, Waldinger filed an action in the United States District Court for the District of New Jersey against Harkins' surety, Reliance United Pacific Insurance Company ("Reliance"), asserting that under the payment and performance bonds which Reliance had issued, it was liable to Waldinger for any damages awarded against Harkins in the arbitration proceeding which Waldinger had commenced against Harkins.[3] *The Waldinger Corporation v. Reliance United Pacific Insurance Company,* C.A. No. 86-1721. Harkins was not named as a party to that action. On October 22, 1986, just two days after filing its instant petition in this Court, Waldinger served upon Reliance answers to Reliance's Interrogatories in that action. Interrogatory 18 requested Waldinger to "identify and attach all documents which represent the construction Subcontract (at the time originally executed) between Harkins and you for construction of the Project." Waldinger's answer to that Interrogatory is as follows:

> *Response:* The original agreement between Waldinger and Harkins is set out in John Harkins' letter of December 16, 1983, signed as accepted by Gary Mitchell that day. This agreement together with documents referenced in this agreement appear in Exhibit 9-1 to these answers. Waldinger and Harkins subsequently *attempted* to enter into a more detailed subcontract agreement using Harkins' subcontract form. The terms "subcontract" or "Waldinger's subcontract" or the "Waldinger/Harkins subcontract", as used in these answers, and as used by

[3] Waldinger did not disclose in the Complaint against Reliance that this action was pending and that the arbitration proceeding had already been enjoined.

> Waldinger on the project, referred to the documents set out in Exhibit 1A to these answers [the Subcontract]. These documents reflect *an attempt* by Waldinger and Harkins to enter into an enforceable contract. There was apparently not a meeting of the minds, however, between Waldinger and Harkins concerning the extent to which Waldinger was bound, under the documents set out in Exhibit 1A, to the terms and conditions of Harkins' contract with the Owner. Furthermore, any agreement by Waldinger to the terms and conditions of the documents set out in Exhibit 1A was based on reliance upon certain material misrepresentations made by Harkins in the negotiation process. These misrepresentations are explained in detail elsewhere in these answers. *Accordingly, Waldinger is maintaining* ***in the alternative*** *that (a) if there is a formal contract for this project between Waldinger and Harkins,* ***other than*** *the December 16, 1983 letter agreement* (in Exhibit 9-1) *and the August 1, 1984 Memorandum of Understanding* (In Exhibit 9-3), it is memorialized by the documents set out in Exhibit 1A; . . . . [Italics and boldface added.]

Thus, at the very same time that Waldinger is seeking to persuade this Court to rule in this case that its disputes with Harkins must be arbitrated under the Subcontract, it is *denying* (except "in the alternative") in a separate federal action involving the exact same subject matter that the very same Subcontract document constitutes an agreement between the parties. These contrary positions by Waldinger raise serious questions as to the viability of any ruling this Court might make if a writ were granted in this case, since, if this Court were to reverse the Third Circuit's decision, the entire record on the arbitration issue would certainly have to be reopened on remand to examine, *inter alia,* whether the *sine qua non* for compelling arbitration in this or any other case—*viz.* that "an agreement in writing for such arbitration" exists, 9 U.S.C. § 3—has been satisfied by Waldinger.

Given the recent revelation of Waldinger calling into question the legal significance of the very Subcontract document upon which it must and does rely to establish a right to arbitration, Harkins respectfully submits that the Petition rests upon a record too uncertain and shaky to merit this Court's review.

3. THE PETITION'S PRINCIPAL CLAIM THAT THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *CONE* IS ERRONEOUS

The principal reason which Waldinger advances for granting the writ is its claim, repeated throughout the Petition, that the Third Circuit's Opinion is in "direct conflict" with this Court's decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1 (1983). In support of its claim of a direct conflict, Waldinger quotes and relies upon the following language as being the "clear holding" of *Cone* (Petition, 7-8):

> Although our holding in *Prima Paint* extended only to the specific issue presented, the Courts of Appeals have since consistently concluded that questions of arbitration must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Waldinger claims that the Third Circuit's decision below is in "direct conflict" with that "clear holding" in two respects. First, Waldinger asserts that the Third Circuit held that district courts are not bound by *Cone* where, in attempting to ascertain the "existence, scope and legal effect" of an agreement to arbitrate, the district court is "interpreting the language of the contracts [and] performing a fact finding function". (Petition, 7-8). Second, Waldinger argues that the Third Circuit "refused

to adhere to *Cone's* mandates" when it declined to "implement the federal policy favoring arbitration outside the context of labor environments." (Petition, 18). However, Waldinger's premises for asserting that the Third Circuit's decision conflicts with *Cone* are erroneous.

(a) The Language Relied Upon From *Cone* Is *Dictum*.

Contrary to Waldinger's assertions, the above language which it relies upon from *Cone* was not the *ratio decidendi* of the case, but was *obiter dictum*.

The issue presented to and decided by this Court in *Cone* was *not* the arbitrability of the underlying dispute. That point was conceded by the party which had sought to avoid arbitration, as this Court expressly noted. 460 U.S. at 29 ("In this Court, the Hospital does not contest the substantive correctness of the Court of Appeals' holding on arbitrability".) The sole issues presented for decision and decided in *Cone* were (i) the "propriety of the District Court's decision to stay a federal suit [seeking an order compelling arbitration] out of deference to the parallel litigation brought in state court action," 460 U.S. at 13, and (ii) the propriety of the procedures employed by the Court of Appeals in considering and deciding the case, 460 U.S. at 29.

Since the language from *Cone* relied upon by Waldinger is *dictum, certiorari* would not be necessary even if Waldinger's claim that the Third Circuit's decision conflicts with that language were correct (which it is not, see pp. 10-13, 15-16, *infra*).

That the above-quoted *Cone* language is *dictum* also disposes of Waldinger's assertion that a writ should be granted to review the Third Circuit's alleged "refusal" to apply that language beyond the environment of labor arbitration.[4] In fact, however, the Third Circuit did not "refuse" to apply the *Cone* language outside the labor environment, but merely stated it

[4] Waldinger also cites *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S.Ct. 3346 (1985), and *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), as cases in which this Court referred to the *Cone* language approvingly in commercial contexts. However, just as in *Cone*, the Court's references in both cases also were *obiter dictum*.

was "uncertain" that arbitration is afforded such a stated preference beyond the environment of labor arbitration (A13), which hardly merits Supreme Court review.[5]

(b) In Any Event, The Third Circuit's Decision Is Not In Conflict With The Cited Language Of *Cone*

Even if the language of *Cone* relied upon by Waldinger were not *dictum* and were deemed to apply outside labor grievances under collective bargaining agreements, the decisions of the lower courts here still would not be in conflict.

The point that Waldinger overlooks or misapprehends is that the *Cone* language refers to the "scope of arbitrable issues", *i.e.*, the question or construction of what issues are arbitrable under or encompassed by a *given* arbitration agreement. Indeed, every case cited by Waldinger for the proposition that doubts concerning the scope of arbitrability should be resolved in favor of arbitration involved a contract where the contours of the arbitration agreement were undisputed. At most, the question in such cases was the legal construction, or effect, to be given the agreement.

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[5] Moreover, although not necessary for denying the Petition, it should be noted that the *Cone* language relied upon by Waldinger emanates, as the Third Circuit indicated (A13), from the Steelworkers Trilogy, *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), which were labor grievance cases decided under the National Labor Relations Act, not the Federal Arbitration Act. In that Trilogy, this Court, emphasizing the differences between arbitration of labor grievance disputes and ordinary commercial arbitrations, established a preference or presumption in favor of arbitrability *in the context of disputes between a union and employer*, ruling that any doubts as to the scope of arbitrable issues *under a collective bargaining agreement* must be resolved in favor of arbitration. Recently, this Court ruled that the presumption in favor of arbitrability articulated in the Steelworkers Trilogy for labor grievance disputes does not even extend within the labor environment to disputes between an employer and trustees of an employee-benefit plan, *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 373 (1984), thus manifesting that the presumption was never intended to be of general application outside the labor grievance context.

Here, in sharp contrast, the parties hotly disputed as a threshold question what the words of the parties' Subcontract said on the subject of arbitration. Waldinger asked the District Court, in ruling on whether the parties' disputes were arbitrable, to ignore the totality of the Subcontract, and instead to look only at the arbitration provision contained in Paragraph 17. Harkins contended that the Subcontract was intended to be and had to be reviewed as a whole, and, therefore, that the Court also had to consider Paragraph 2, which, in salient part, said (A8):

> *SUBCONTRACTOR* ***shall be bound*** *by* all provisions of these documents and also by applicable *provisions of the PRINCIPAL CONTRACT* [with the owner] *to which the CONTRACTOR is bound,* ***and to the same extent.*** [Italics and boldface added.]

Harkins asserted that Paragraph 2 was intended to limit Waldinger's rights and remedies under the other provisions of the Subcontract, including but not limited to Paragraph 17, so they would be no greater than Harkins' rights under the Principal Contract.[6] Thus, prior to even being able to address whether the scope of the parties' arbitration agreement encompassed the claims of the parties—the function which is the subject of the *Cone dictum* relied upon by Waldinger—the District Court here first had to engage in basic contract interpretation to determine what the arbitration agreement of the parties was, *i.e.,* whether the parties intended by Paragraph 2 for the provisions of the Principal Contract to limit Waldinger's rights and remedies under other provisions of the Subcontract. Neither *Cone,* nor any other case cited by Waldinger for the proposition that doubts as to the scope of an arbitration clause should be resolved in favor of arbitration, involved a court engaging in such contract interpretation.

Waldinger apparently recognizes this fundamental distinction between the instant case and the cases cited in its Petition, for time after time the Petition misstates both the

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[6] As previously noted, Waldinger now concedes that the claims being asserted by the parties would not be arbitrable under the Principal Contract. (Petition, 4).

language of *Cone* and the holding of the Third Circuit. Specifically, the Petition repeatedly accuses the Third Circuit of violating the purported "dictates" of *Cone* by allegedly holding "that district courts are not bound by *Cone* where in attempting to ascertain the *existence* and scope of an agreement to arbitrate the district court is 'interpreting the language of the contracts [and] performing a fact finding function.' " (Petition, 8; *see also, e.g.,* Petition, 7, 10, 13) (italics added). In fact, however, even apart from all of the other points discussed above with respect to Waldinger's reliance upon the language it quotes from *Cone,* neither that language, nor the language of any other case cited by Waldinger, ever said or suggested that in attempting to ascertain the "*existence*" of an arbitration agreement, courts must resolve doubts in favor of arbitration. Furthermore, the Third Circuit never said that the language of *Cone* did not apply where district courts construe the *scope of arbitrable issues* under a given arbitration agreement.

By erroneously suggesting that the *Cone* language it relies upon applies to a determination of even the "existence" of an arbitration clause, Waldinger seeks to greatly enlarge that *dictum* beyond its plain words to encompass the type of basic contract interpretation which the District Court below engaged in and the Third Circuit reviewed. The object of Waldinger's exercise is revealed at pages 11-12 of the Petition when Waldinger argues that the analysis of the District Court and Third Circuit necessarily entailed a finding that certain terms of the parties' Subcontract are ambiguous. From this premise, Waldinger argues that at the point of that doubt, *Cone* required the lower courts to resolve that doubt in favor of arbitration. However, if the lower courts found any doubt, it was not in construing the scope of arbitrable issues under the arbitration agreement, which is all that the *Cone dictum* speaks of, but in determining what was the arbitration agreement to be construed. Indeed, the interpretative function which the District Court had to perform had nothing to do with arbitrability *per se,* since no one has ever claimed that the critical language of Paragraph 2 which the District Court interpreted was intended to limit only arbitration rights under Paragraph 17. The Third Circuit noted that once the intent of the instant Subcontract's

provisions are interpreted, there can be no doubt as to the scope of arbitrable issues under the Subcontract. (A7). To suggest, as Waldinger does, that any time there might be some doubt in interpreting contractual provisions incident to identifying an arbitration agreement, a court must blindly and automatically rule in favor of arbitrability, not only would fly in the face of the black letter rules that arbitration is a creature of contract, and that a party cannot be required to submit to arbitration any dispute which he has not agreed to submit, *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), but would defeat the very purpose of the Federal Arbitration Act, which was not to willy-nilly make claims arbitrable, but to enforce agreements which parties have reached respecting the arbitration of disputes. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985).

In sum, regardless of whether or not the *Cone* language relied upon by Waldinger is *dictum* or a binding rule of law, the decision of the Third Circuit below is not in conflict with it.

4. THE STANDARD OF REVIEW EMPLOYED BY THE THIRD CIRCUIT IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OTHER COURTS

(a) Waldinger Mischaracterizes The Standard Of Review Applied By The Third Circuit

Waldinger's claim that a conflict exists between the decision of the Third Circuit and decisions of this Court or other Circuits as to the applicable standard of review is predicated upon a mischaracterization of the Third Circuit's decision.

Waldinger erroneously asserts that "[t]he majority below held that the District Court's *legal determination* concerning the *existence and scope* of an agreement to arbitrate consisted of contract 'interpretation' rather than contract 'construction' and was reviewable only pursuant to the clearly erroneous standard". (Petition, 13) (italics added). The Third Circuit made no such ruling. What the Third Circuit in fact held was the following (A7):

> We therefore conclude that the judicial task performed by the district court here was contract inter-

> pretation, i.e., determining the intent of the parties regarding arbitration. The Court was required to find as a fact what the contracting parties intended. It had to divine this intent from the language of the contract documents and any extrinsic evidence that went to the issue of intent. Once we review the district court's language interpretation, the legal operation of that interpretation on review follows easily. The proper standard of review has to be whether the district court's findings—interpretation of the contract, that is, the intent of the parties as to the meaning of the contract's language—are clearly erroneous. We hold that its interpretation is not clearly erroneous.

As is evident from the above comparison of the actual ruling of the Third Circuit and Waldinger's mischaracterization of it, Waldinger is again confusing two entirely different functions performed by the District Court: (1) determining what the parties meant by Paragraph 2 of their Subcontract in order to identify the terms of the arbitration agreement, and (2) determining the operation and effect of the parties' arbitration agreement upon the facts and issues presented. Thus, as the Third Circuit discussed and explained (A4-A7), the first function, *viz.* determining what the parties understood and intended by disputed Paragraph 2 of their Subcontract, is a factual matter of contract interpretation. The second, *viz.* determining the legal operation or effect of the arbitration agreement, as interpreted, in light of the facts of the case and the applicable law, is a matter of contract construction, which is a legal determination. Waldinger ignores the factual issue it created below in denying that the parties intended the critical provision of Paragraph 2 of the Subcontract ("SUBCONTRACTOR *shall be bound* by . . . applicable provisions of the PRINCIPAL CONTRACT to which CONTRACTOR is bound, *and to the same extent")* to limit Waldinger's rights and

remedies under the Subcontract.[7] The decision of the Third Circuit makes plain that it was only the function of contract interpretation performed by the District Court which was reviewed under the clearly erroneous standard applicable to factual determinations. See Fed.R.Civ.P. 52(a) ("Findings of fact, whether based on oral *or documentary evidence,* shall not be set aside unless clearly erroneous") (italics added). The ultimate and only legal determination by the District Court —whether the disputes of the parties are within the scope of arbitrable issues under the provisions of the Subcontract, as interpreted—was not reviewed under the clearly erroneous standard. However, as the Third Circuit noted, "[o]nce we review the district court's language interpretation, the legal operation of that interpretation on review follows easily." (A7). Indeed, Waldinger now concedes that point as well.

(b) There Is No Conflict Between The Decision Of The Third Circuit And Decisions Of This Court Or Other Circuits As To The Applicable Standard Of Review

Waldinger's contention that the standard of review applied by the Third Circuit conflicts with that required by this Court's decisions in *Cone* and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 105 S.Ct. 3346 (1985), and with the standard applied by other Circuits, is without merit and based upon a misreading of the cases cited.

Waldinger's claim that this Court in *Cone* "endorsed" the Fourth Circuit's "*de novo* inquiry into the question of arbitrability" (Petition, 14) is erroneous and, in any event, irrelevant to the issue of the proper standard of review. It is erroneous because this Court gave no such "endorsement", but rather ruled that "we are not disposed to disturb the court's

[7] If the arbitration provision in Paragraph 17 had begun with words from Paragraph 2, *i.e.,* "To the same extent provided by the provisions of the Principal Contract," Waldinger would never have even been able in good faith to take the position that the parties' disputes are arbitrable. However, in interpreting the Subcontract as a whole, it is apparent that is exactly how Paragraph 17 was intended to be read. The parties did not have to redundantly state that preface before every affected paragraph of the Subcontract.

discretion in its handling of the case in view of the special interests at stake and the apparent lack of any prejudice to the parties."[8] 460 U.S. at 29. More importantly, the Fourth Circuit did not review any substantive determination on the issue of arbitrability by the District Court, because the District Court had made none. The only action the District Court took was to stay the action before it in deference to a parallel action in state court. Thus, this Court's affirmance of the Fourth Circuit's decision in *Cone* is wholly inapposite to the issue of the standard of review of the decision of the District Court in this case.

Waldinger's citation of *Mitsubishi* as another decision of this Court with which the Third Circuit's Opinion purportedly conflicts, and Waldinger's statement of that case, also widely miss the mark. Contrary to Waldinger's contention, this Court in *Mitsubishi* did *not* "endorse the First Circuit's *de novo* inquiry into the scope and operation of an arbitration clause previously reviewed, analyzed, construed and interpreted by the District Court." (Petition, 15). The standard of review that the First Circuit had applied was not, from all that can be determined from this Court's Opinion, raised as an issue before this Court, and certainly was never addressed by this Court.

The nature of Waldinger's confusion is revealed by its quotation of and emphasis upon (Petition, 16) this Court's statement in *Mitsubishi* that:

> [T]he Court of Appeals correctly conducted a two-step inquiry, first determining whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding it did, considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims. We endorse its rejection of Soler's proposed rule of arbitration clause construction.

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[8] The party that had been opposing arbitrability in *Cone* did not contest in this Court the Circuit Court's ruling on arbitrability. 460 U.S. at 29.

What Waldinger overlooks is that this Court had previously stated that its consideration of the First Circuit's decision was limited to the question of the *legal effect* of the parties' arbitration agreement, as interpreted:

> At the outset, we address the contention raised in Soler's cross-petition that the arbitration clause at issue may not be read to encompass the statutory counterclaims stated in its answer to the complaint. *In making this argument, Soler does not question the Court of Appeals' application of ¶ VI of the Sales Agreement* [the arbitration clause] *to the disputes involved here as a matter of standard contract interpretation.*[13] *Instead, it argues that* ***as a matter of law*** a court may not construe an arbitration agreement to encompass claims arising out of statutes designed to protect a class to which the party resisting arbitration belongs "unless [that party] has expressly agreed" to arbitrate those claims, . . . by which Soler presumably means that the arbitration clause must specifically mention that statute giving rise to the claims that a party to the clause seeks to arbitrate. See 723 F.2d at 159.
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> 13. *We therefore have no reason to review the Court of Appeals' construction of the scope of the arbitration clause in light of the allegations of Soler's counterclaims. . . .*

105 S.Ct. at 3353 (italics and boldface added).

In sum, in "endorsing [the First Circuit's] rejection of Soler's proposed rule of arbitration-clause construction," this Court was endorsing only the rejection of a proposed rule of law which would automatically exclude arbitration of claims arising out of statutes unless the arbitration agreement specifically mentions the statute giving rise to the claim, and was not addressing or endorsing any standard of review.

Even apart from the fact that this Court's Opinion in *Mitsubishi* does not address the issue of the standard of review, a critical distinction exists between *Mitsubishi* and this case.

Contrary to Waldinger's contentions, *Mitsubishi* did not involve any contractual interpretation issue as to what the terms of the arbitration agreement were. The arbitration agreement was set forth in Paragraph VI of the Sales Agreement, and there was no contention that the parties intended for any other provision of the parties' agreements to enlarge, restrict or otherwise modify what was stated in Paragraph VI. Thus, in reviewing the question of arbitrability, the First Circuit, as this Court noted and as the First Circuit's Opinion reveals, only conducted a two step inquiry of (1) comparing the undisputed language and intent of Paragraph VI to the nature of the claims asserted to determine whether the arbitration agreement encompassed such claims, and then (2) considering whether legal constraints external to the parties' agreement, as, for example, whether antitrust claims are arbitrable as a matter of law, foreclosed the arbitration of those claims. It was these ultimate or legal determinations that the First Circuit reviewed *de novo.*

In the instant case, the Third Circuit similarly reviewed *de novo* the question of whether the parties' arbitration agreement, as interpreted by the District Court, encompassed the claims being asserted by the parties, and that determination is not challenged here. The Third Circuit did not have to conduct *Mitsubishi's* second inquiry of considering external legal constraints, since none were suggested by the parties. However, in sharp contrast to *Mitsubishi,* the Third Circuit here had to conduct an inquiry preliminary to those two steps, *i.e.,* review of the District Court's finding, based upon the evidence submitted, of the disputed contract interpretation issue of what the arbitration agreement in the Subcontract said. It was to that finding, and only to that finding, that the Third Circuit applied the clearly erroneous standard of review, a standard which cannot conflict with any holding of *Mitsubishi* because that issue was not involved in *Mitsubishi.*

Explo, Inc. v. Southern Natural Gas Co., 788 F.2d 1096 (5th Cir. 1986), and all of the other appellate decisions cited at page 6 of the Petition as purportedly being in conflict with the Third Circuit's decision here, are inapposite and distinguishable for precisely this same reason. Upon review of those cases, it is

apparent that all Waldinger demonstrates by its out-of-context, parenthetical quotations is occasional lack of precision by the courts in use of the terms "interpretation" and "construction", for it is clear that none of those cases involved review of a threshold factual finding as to what parties understood and intended their contract to say on the subject of arbitration.[9]

(c) In This Case, The Standard Of Review Was Not Material To The Third Circuit's Decision

Finally, in the context of this case, it is academic whether the Third Circuit should have applied the clearly erroneous standard, or, as Waldinger contends, a *de novo* standard in reviewing the District Court's interpretation of what the parties' arbitration agreement said.

Under the clearly erroneous standard which it employed, the Third Circuit could have reversed if it had found the District Court's interpretation of the Subcontract "wholly implausible", *i.e.*, contrary to the only possible view of the evidence. *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985). However, if it had reviewed the District Court's decision under a *de novo* standard of review, the Third Circuit similarly could have altered the trial judge's interpretation only if it found, as a matter of law, that the Subcontract was subject to only one reasonable interpretation, which was different from the District Court's. *E.g., Matter of Barclay Industries, Inc.*, 736 F.2d 75 (3rd Cir. 1984).

In short, the standard of review was not determinative of the outcome of the issue reviewed since, if the Third Circuit would have been prepared to say that the interpretation was in error as a matter of law, it would have found the District Court's interpretation to be clearly erroneous.

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[9] Given the seemingly unique contractual language at issue here, and also Waldinger's inability to cite any cases on point, it would appear that this issue is unlikely to recur—yet another reason for denying the Petition.

5. THE THIRD CIRCUIT'S DECISION IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS CONCERNING CONTRACT PROVISIONS INCORPORATED BY REFERENCE

In the last section of its Petition (pp. 19-23), Waldinger erroneously argues that the Third Circuit's Opinion is in conflict with decisions of other Circuits with respect to the effect upon a subcontract of provisions incorporated by reference from a principal contract.

This final contention misapprehends or overlooks several central points. The critical provision of Paragraph 2 of the Subcontract does not say that it is incorporating the terms of the Principal Contract by reference, as does every case cited by Waldinger. Rather, Paragraph 2 contains a positive command ("shall be bound . . . to the same extent") making Waldinger's rights and remedies under the general provisions of the form Subcontract, which Harkins employs on every project, subservient to the rights and remedies provided by the Principal Contract. The District Court found as a fact from Waldinger's own conduct in the negotiations of the Subcontract (A49-A51), and from Harkins' affidavit (A48-A49), that both parties so understood the meaning and intent of Paragraph 2.[10]

Thus, since the right to arbitration is strictly a matter of contract, it is subject to and determined by the agreement of the parties, *Steelworkers v. Warrior & Gulf Navigation Co., supra,* not what other parties might have been found to have done in a different contract on a different project. On these, and other

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[10] Although Waldinger now objects to Harkins' affidavit, it raised no objection before the District Court, and in fact was the first to file an affidavit with respect to the arbitration motions before the District Court. In any event, the affidavit was proper and admissible as evidence, *inter alia*, of a relevant usage which Harkins attached to Paragraph 2 and of which Waldinger had knowledge as evidenced by the additional language which it caused to be added to Paragraph 2 by amendment (A49-A51), *see* Restatement (Second) Contracts § 220, and of relevant circumstances and practices in the industry to which the Subcontract pertained, *see* Restatement (Second) Contracts § 222.

grounds as well, the cases cited by Waldinger are all distinguishable from and not in conflict with the Third Circuit's decision here.[11] Similarly, the Opinions of the lower courts in this case have no impact on arbitration or other provisions in other contracts, as those Opinions stand for no more than a factual finding, based upon the facts shown, of what these two private parties intended and agreed upon with respect to arbitration in their unique private contract.[12]

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[11] Waldinger has argued below that the language in this Subcontract binding the subcontractor by the terms of the contract with the owner "to the same extent" as the contractor also appeared in the subcontract in *Perry v. United States*, 146 F.2d 398 (5th Cir. 1945). However, a careful reading reveals *Perry* to have said that the contractor in that case argued that that was *the effect* of the language in the Subcontract, not that it was the language of the subcontract itself.

[12] Waldinger's contention that the District Court's interpretation of the Subcontract negates and renders Paragraph 17 nugatory is erroneous, since Paragraph 2 was only directed to the subcontractor. It was Waldinger's amendment to Paragraph 2 which similarly limited Harkins' rights and remedies *vis-a-vis* Waldinger which resulted in the particular claims asserted below by both parties being nonarbitrable.

CONCLUSION

For all of the above reasons, Harkins respectfully submits that the Petition for a Writ of Certiorari should be denied.

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